Supreme Court, U.S.
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90-820

Case No. _____

In The

Supreme Court of the United States

October Term 1990

Jack R. Whitehorn and
Mary Ruth Whitehorn

Petitioners

vs.

Margaret H. Murphy,
Law Firm: Smith, Gambrell & Russell and
Robert M. Garstin

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the doctrine of *res judicata* can be applied, whereas the court being sanctioned as the court rendering final judgments to effect *res judicata*, expressly abdicated jurisdiction over the meritorious issues involved in this instant complaint?

2. Whether the "property rights" recovered by "*settlement*" as entered by court order, being crux of complaint, constitute a final decision on the merits for application of doctrine of *res judicata* in the instant case?

3. Whether the doctrine of *res judicata* can withstand the constitutional protection of "property rights" as granted by the Fifth Amendment and protection thereof as determined by this Honorable Court?

4. Whether, after a court has dismissed a complaint for improper service, the same court can then make findings of fact and conclusions of law on the complaint dismissed?

5. Whether in the public interest, relating to administrative agency law (FCC), as there is no case precedent to the issues herein, this case should be published for benefit of said agency for protection of infringement on valid broadcast license holders?

PARTIES OF INTEREST

Persons interested in the outcome of the petition herein are:

1. Trial Court; United States District Court, District of Nevada. Judge Philip M. Pro.
2. United States Bankruptcy Court for the District of Nevada. Bankruptcy Judge Robert Clive Jones.

3. Reviewing Justices of the United States Court of Appeals for the Ninth Circuit.

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DECISION BELOW AND JURISDICTION INVOKED

The August 21, 1990 decision of the United States Court of Appeals for the Ninth Circuit in the instant cases No. 89-15630 and No. 89-15767 is unreported by express memorandum of the court.

The trial court, the United States District Court, District of Nevada, decision in Court of Appeals Case No. 89-15630 was entered April 26, 1989 and is unreported.

The trial court, the United States District Court, District of Nevada, decision in Court of Appeals Case No. 89-15767 was entered June 6, 1989 and is unreported.

Jurisdiction by writ of certiorari granted upon petition is vested under Title 28 U.S.C. § 1254.

No extension of time has been requested or granted to file the instant petition for a writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED

This case involves the doctrine of *res judicata*.

Claim preclusion applies to order or judgment when prior judgment is valid in that it was rendered by a court of competent jurisdiction and in accordance with requirements of due process, judgment was final and on merits.

U.S.C.A. Constitutional Amendments 5, 7 and 14. (Appendix 12)

This case further involves the following statutes:

U.S.C., Title 47 § 151. (Appendix 13)
U.S.C., Title 47 § 301. (Appendix 13)
U.S.C., Title 47 § 303. (Appendix 13)
U.S.C., Title 47 § 309. (Appendix 13)
U.S.C., Title 47 § 310. (Appendix 13)

Federal Communications Rules & Regulations § 73.3540, Applicants for Voluntary Assignment or Transfer of Control. (Appendix 14)

U.S.C. Title 18 § 1001. **Statements or Entries Generally**

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statements or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Title 18, U.S.C. § 1961(1)(d) -- "Any offense involving fraud connected with a case under Title 11." (Appendix 15)

Title 18, U.S.C. § 2516(1)(e) -- "Any offense involving fraud connected with a case under Title 11." (Appendix 15)

Case No. _____

In The

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October Term 1990

Jack R. Whitehorn and
Mary Ruth Whitehorn

Petitioners

vs.

Margaret H. Murphy,
Law Firm: Smith, Gambrell & Russell and
Robert M. Garstin

Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Jack R. Whitehorn and Mary Ruth Whitehorn, petitioners herein, respectfully pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit entered in the above entitled cases on August 21, 1990.

STATEMENT OF THE CASE

On July 1, 1988 petitioners' complaint was filed in the United States District Court, District of Nevada. The basis of jurisdiction, diversity under 28 U.S.C. § 1332 - 28 U.S.C. § 1334(a)(d), a diversity based on bankruptcy fraud. The said complaint set forth jury demand. The United States Court of Appeals for the Ninth Circuit reviewed the district court's summary judgments pursuant to Title 28 U.S.C. § 1291. (Appendix 1) No other court of appeals has decided a case that presents the precise issue of the case herein. (Complaint at Appendix 4.) This instant case is "unique." The prosecution of a case of this nature is unprecedented.

The instant complaint, *inter alia*, sets out as the principal cause of action "fraudulently transferring a Federal Communications Commission (FCC hereinafter) broadcast license without any judicial power" (*i.e.*, third party injury by deprivation) and denying petitioner Jack Whitehorn's "property rights" decreed by "*settlement*" and an order, approving the contract, entered January 26, 1984, by a court of competent jurisdiction. Said contract was protected by the United States Bankruptcy Court for the District of Nevada pursuant to 11 U.S.C. § 362 (automatic stay effective October 6, 1980 *infra*). Further, the constitutional privilege of the Fifth Amendment, providing that no person shall be deprived of life, liberty or property without due process of law is applied.

The respondents, in all pleadings in lower courts, have not at any time disavowed petitioners' common sense and legal rationale underlying the claim of "Fraud of the FCC licenses," but assert only improper service and the doctrine of *res judicata* barring prosecution of said complaint. Summary judgment was granted on said premise. (Appendices 2 and 3)

The respondents cleverly manipulated the WFDR, Inc. bankruptcy case commenced May 9, 1980 in the United States Bankruptcy Court, Northern District of Georgia, Newnan Division and petitioners' bankruptcy case commenced October 6, 1980 in the United States Bankruptcy Court, District of Nevada to the magnitude of asserting that the proceedings in said bankruptcy cases included or should have raised the instant "fraud" complaint to serve their purpose of defeating said complaint by applying the doctrine of *res judicata*. Respondents contrived perception of said complaint is without legal merit or any judicial authority. Moreover, the petitioners are, through economic necessity, pro se litigants. Respondent Murphy is a lawyer, and now a bankruptcy judge; the respondent law firm and respondent Garstin are implicated with prior bankruptcy cases. These facts imply that petitioners' factual writings put before the lower courts were considered on principles of *confrere*. Hence, the lower court depicted the said complaint as frivolous and would entertain no petition for rehearing. Additionally, the court set out further litigation of the WFDR's sale will result in sanctions. "Sanctions are inappropriate if the party pursuing the claim has a nonfrivolous argument for avoiding *res judicata*"; *see International Ass'n of Machinists v. Boeing Co.*, 833 F.2d 165, 172 (9th Cir. 1987). The instant action is clearly nonfrivolous and crucially summons this Court's guidance![1]

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[1] The complaint at bar is not as the lower court characterizes, "further litigation of the WFDR's sale." The complaint (at Appendix 4) is a straightforward "fraud" claim of "Property Rights." Petitioner Jack Whitehorn instituted a proper adversary proceeding (discussed in detail *infra*) consistent with Bankruptcy Rules 7001 through 7003, against John F. Whitehorn. Said proceeding was prosecuted to finality with a final order "*settlement*" entered January 26, 1984 in the United States Bankruptcy Court, Northern District of Georgia, Newnan Division. The Court noted in the order the preference action was in favor of petitioner Jack Whitehorn as set out verbatim in the instant

The lower court's illogical deduction that the instant complaint is "further litigation of the WFDR's sale" is most confusing, contrary to the United States Constitution, directly conflicting with other United States Court of Appeals adjudications and not uniform to its own published precedent cases, as well as Federal statutes enacted by Congress and rules of a Federal Administrative Agency. The litigation is at a determining conclusiveness and beseeches this Honorable Court's supervision.

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complaint. The Court found the action had become "*moot*" under the terms of the "*settlement*." "It is well settled that the dismissal of a case because it is "*moot*" does not lay a basis for the application of *res judicata*"; *N. Sims Organ & Co. v. SEC*, C.A. 2d, 1961, 293 F.2d 78, 81-82 certiorari denied 82 S. Ct. 440, 368 U.S. 968, 7 L. Ed. 2d 396. Further, it is universally acknowledged that the parol evidence rule is not a rule of evidence at all, rather it is a rule of substantive law founded upon the substantive "**rights**" of the parties; *Bakee v. Rapport*, 453 F. 2d 1141 (1st Cir 1972); *Centronics Financial Corp. v. El Conquistador Hotel Corp.* 573 F.2d 779,782 (2d Cir. 1978); *Betz Laboratories, Inc. v. Hines*, 647 F.2d 402, 405 (3rd Cir. 1981); *Rock-Ola Mfg. Co. v. Wertz*, 282 F.2d 208 (4th Cir. 1960); *Southern Stone Co., Inc. v. Singer*, 665 F.2d 698, 701 (5th Cir. 1982);*Nutrena Milla, Inc. v. Yoder*, 187 F. Supp. 415 (N.D. Iowa 1960), affirmed 294 F.2d 505 (8th Cir. 1961); *Vickery v. Fisher Governor Co.*, 417 F. 2d 466,468 (9 Cir. 1969); *American Crystal Sugar Co. v. Nicholas*, 124 F.2d 477 (10th Cir. 1941). The agreement resolved the ownership rights which had been the subject of legal battles for some four years. The "*settlement agreement*" is a contract; *Clausen Co. v. Daynatron/Bondo Corp.*, 889 F.2d 459 (3rd Cir. 1989). A contract is an asset even though the trustee may not be able to assume or assign it under 11 U.S.C. § 365; See *In re Computer Communications, Inc.*, 824 F.2d 725, 16 B.C.D. (9 Cir. 1987). The contract clause of the Constitution bars impairment of rights of the parties if substantial. A change in how remedies are utilized is not a major impairment; *Honeyman v. Hanan*, 302 U.S. 375, 58 S. Ct. 273, 82 L.Ed 312 (1937). An additional affirmation of said "*settlement*" may be found in the trial court's order entered July 31, 1987 Appendix 5).

The respondents' characterization of the instant complaint is misleading and irrelevant. The respondents allege and the lower court affirms that the complaint seeks damage for loss of the WFDR stock. The respondents' analysis of said complaint is ungrounded. Respondents fuse as one, the corporate WFDR stock, the FCC broadcast licenses and the corporate assets and claim *res judicata* because, as respondents phrase it, those claims have been repeatedly litigated to finality in earlier judicial proceedings in the WFDR, Inc. bankruptcy case as well as petitioner's bankruptcy case. This fiasco is the crux of the necessity of this Court's guidance. Petitioner's holdings have been so confused by respondents in their pleadings, the matter has reached a point of being out of touch with reality. Respondents and lower court's characterization of the case herein is not pursuant to the actuality of judicial decrees of (1) corporate stocks,[2] (2) corporate assets[3] and the leading issue complained for (3)

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[2] This Court in case No. 88-647 cert. denied -- U.S. --, 109 S. Ct. 567, 102 L. Ed. 592(1988) (by denying certiorari, affirmed the July 31 1987 United States Bankruptcy Court, Northern District of Georgia, Newnan Division order entered July 31, 1987 (Appendix 5) wherein the trial court with compelling clarity interpreted the corporate stock in the corporation whose corporate shares were cancelled by said court as "Property Rights" preserved by ownership. The said corporate shares, as evidenced by "certificates of interest," were issued in place of actual stock certificates. The "Property Rights" are well defined in *Evans v. Stockton & Hing, (In re Southwest Restaurant Systems)*, 607 F.2d 1243 (9th Cir. 1979) cert. denied 444 U.S. 1081 (1980). Bankruptcy proceedings are subject to the Fifth Amendment; *United States v. Security Indus. Bank*, 459 U.S. 70, 75 103 S. Ct. 407, 410, 74 L. Ed. 2d 235 (1982). As a general proposition, even Congress is not free to give away Constitutional rights.

[3] "Corporate Assets": In the context of bankruptcy, in general, even a corporation whose shares (as in this matter) are owned by a single person or other entity is a separate and different entity. The owner is not a party to the corporate bankruptcy proceedings; *In re Johnie T. Patton*, Inc., 12 B.R. 470 (Bkrtcy D. Nev. 1981). What are assets of a

FCC broadcasting licenses.[4] Applying the doctrine of *res judicata* to the instant complaint is as unmixable as oil and water and as self-contradictory as "guilty innocence."

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corporate or individual debtor estate? Title 11 U.S.C. § 541(a)(1) provides regardless of location, property of the estate is comprised of "all legal and equitable interests of the debtor as of the commencement of the case. Under the Code as under the act, the question of what is "Property" is a federal question; *In re Ford*, 3 B.R. 559 B.C.D. 202 (Bkrtcy D. Md. 1980), affirmed 638 F.2d 14 (4 Cir. 1981). A district judge noted that property of the debtor was under jurisdiction of the bankruptcy court but that until he determined whose it was, it was not property of the debtor; *National Co-Op Refinery Ass'n v. Rouse*, 60 B.R. 857 (D. Colo. 1986). In this case the stock or "property rights" were not decided or "*settled*" until January 26, 1984 *supra*, *res judicata* precluded.

[4] The "true owner of said property (respondents not parties to dispute) should not be bound by the efforts of another who may lack any genuine interest in the dispute"; *Dull v. Blackman*, 1898, 18 S. Ct. 333, 335, 169 U.S. 243, 248, 42 L. Ed. 733. *In Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984), this Court set forth the general principles to be applied when federal courts review an agency's interpretation of the statute it implements. This Court said: "When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that it is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the Court determines Congress has not directly addressed the precise question at issue, the Court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based upon a permissible construction of the statute." Id at 842-843, 104 S. Ct. at 2781-82. (Footnotes omitted.)

The following is express pursuant to Title 47 § 301 Congress has power to grant and deny broadcasting licenses and to delete existing stations; *Red Lion Broadcasting Co. v. F.C.C.*, Dist. Col. 1969, 89 S. Ct. 1794, 395 U.S. 367, 23 L. Ed. 2d 271.

Addressing the "ownership of property rights in the entity of WFDR, Inc." and extinguishing *res judicata*: "The *res judicata* effects of a federal court decree . . . are governed by federal decisions especially since the decision "involved rights protected by the Constitution of the United States"; *Gunter v. Atlantic Coast Line R.R.*, 1906 26 S. Ct. 252, 259, 200 U.S. 273, 290-291, 50 L. Ed. 477.

The respondents filed a voluminous amount of papers (irrelevant, based on the comprehensive facts of the case at bar) -- partially, if not the entire record of the WFDR, Inc bankruptcy case. They further devised and filed with the district court *animo*, a defective proposed order which the said court used substantially. These actions were committed with only one scheme to accomplish: Simply to create a maze of such apex that the district court would trust the respondents' integrity in their noble profession as lawyers -- and placing full confidence in their opinion -- would grant their motion(s) for summary judgment as affirmed by the appeals court.[5]

Title 47 § 301 provides: "It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission . . . and no such license shall be construed to create any *right, beyond the terms, conditions and periods of the license* . . . . (Italics supplied.)

Title 47 § 309(b)(2) provides: "Neither the license nor the *right granted thereunder shall be assigned or otherwise transferred in violation of this chapter.*" (Italics supplied.)

[5] The petitioners showed the WFDR stock "property rights" as litigation in progress as to ownership question in petitioners' schedule of assets filed with petitioners' bankruptcy court. The debtors chose in action become assets of the estate: *Hester v. Farmers Home Admin.*, 49 B.R. 593 (E.D. Mo. 1985); *In re Bevier*, 12 B.R. 75, 8 B.C.D. 80 (Bkrtcy D.S.D. 1981). The FCC retains continuing jurisdiction over broadcasting license, despite chapter 11 bankruptcy case; see *LaRose v. FCC*, 494 F.2d 1145 (D.C. Cir. 1974). Title 47 § 303 provides: the power to license a radio station or to transfer, assign or annul such

The United States Bankruptcy Court, Northern District of Georgia, Newnan Division administering the WFDR, Inc. case enacted, *ex parte*, the authority that every court has the jurisdiction to determine its own jurisdiction. The said court, by order entered March 16, 1981 (at Appendix 6), expressly rejected jurisdiction over FCC questions of law in said bankruptcy cases. The Court said at page 5, ¶ 2 of said order: "*The final objection to the sale is based on the premise that the sale violates the rules and regulations of the FCC. While the decision as to whether or not the sale does violate the rules of that body is not for this court.*" (Italics added.) Further, *In re D. H. Overmyer Telecasting Co., Inc.*, 35 B.R. 400 (Bkrtcy 1983), the court found the corporate debtor's FCC license was not property of the estate.

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licenses is within the exclusive jurisdiction of the Commission: *Johnson V. Radio Station WOW*, 1944, 14 N.W. 2d 666, 144 Neb. 406 reversed on other grounds 65 S. Ct. 1475, 326 U.S. 120, 89 L. Ed. 2092, mandate conformed to 19 N.W. 2d 853, 146 Neb. 429, motion denied 66 S. Ct. 11, 326 U.S. 804, 7 L. Ed. 2d 489.

Murphy testified no court approval was sought nor were any orders entered by a court of competent jurisdiction (more specifically, the Georgia Bankruptcy Court administering the WFDR, Inc. case) to move WFDR, Inc. debtor-in-possession back to entity WFDR, Inc. Further, Murphy submitted a fraudulent writing before the FCC for the purpose of assignment and transfer of petitioner's property rights. Murphy further testified under oath that WFDR, Inc. was liquidated for cash, then under oath testified WFDR, Inc. entity continued in existence. Murphy then admitted and testified under oath she appeared before the United States Bankruptcy Court Northern District of Georgia, Newnan Division, the court administering the WFDR, Inc. case and plead that the entity of WFDR, Inc. would cease to exist. As set out *supra* Murphy and Law Firm: Smith, Gambrell & Russell appeared as counsel of record and estate administrator in the WFDR, Inc. bankruptcy case. Accordingly, *res judicata* does not aply when the parties appear in one action in a representative capacity and in a subsequent action in an individual capacity; *Clark v. Amoco Production Co.*, 794 F.2d 967, 973 (5th Cir. 1986).

Dismissal of a claim because of jurisdictional limitation is not res judicata; *Lindy v. U.S.*, Ct. CI. 1976, 546 F.2d 371, 373.

The instant complaint (at Appendix 4) recites claims for relief in that an adversary proceeding filed in the petitioners' bankruptcy case, District of Nevada, on December 8, 1980 subsequently transferred to the United States Bankruptcy Court, Northern District of Georgia, Newnan Division and sought 100% of the outstanding stock of WFDR, Inc. The recital clearly specified the court's final judicial determination of said adversary proceeding entered January 26, 1984, determining petitioner Jack Whitehorn as owner of 100% of WFDR'S corporate stock free and clear of all claims, pursuant to the preference action becoming "*moot*" under the terms of the "*settlement*." This Court has decreed, the bankruptcy estate consists of all property of the debtor including not only tangible personal property, but also intangible property and *causes of action*; *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 103, S. Ct. 2309, 76 L. Ed. 2d 515 (1983). (Emphasis added.) The instant complaint at ¶ 6-7 sets out an adversary proceeding, "Complaint to Compel Turnover of Property" was in progress at time of filing the cause of action at hand. Further, the complaint stated the fraud claims made were discovered while researching and deposing certain defendant as well as emphatically disclosing, "If Plaintiffs fail in said turnover proceeding (of the actual stock certificates), there is no dispute that the Plaintiffs/Debtors-in-Possession' estate has all the rights that free and clear titled ownership of the stock gives said estate pursuant to "*settlement*" and entered by court order."

Moreover the complaint sets out respondents "by fraud" interfered with petitioner's "property rights" by appearing before the FCC and having a valid FCC

broadcasting license assigned and transferred without any judicial power.

Petitioners, pursuant to Fed. R. App. P. 44 notified lower court of constitutional question pursuant to order entered August 31, 1989. (Order at Appendix 7)

The respondents alleged the doctrine of *res judicata* estops all claims of petitioners. Additionally, in lower court case No. 89-15630, respondents allege improper service. The appeals court affirmed. Concerning improper service, petitioner (recognizing our incompetent ability in contrast to learned legal scholars) respectfully presents these creditable queries: (1) How can any judge grant relief if the parties are not properly before the court? (2) As service is an integral part of the process, how can a court make findings of fact and conclusions of law as to the substantive cause of action if the action is dismissed and the parties not properly before the court? The case cries for this Court's direction.

The appeals court affirmed improper service in case No. 89-15767. Respondent Garstin was hand served and has not contested the service process. A clear *erratum* of the lower court.

ARGUMENT FOR THE ALLOWANCE OF THE WRIT

Petitioners herein will lay out the unmitigated facts surrounding the instant complaint in common layman's terms. Economic necessity caused by the said complaint leaves petitioners with no legal counsel so we must proceed pro se.

As is often the case, a most appropriate starting point is to look to this Honorable Court for superior guidance. Petitioners are not arguing the WFDR, Inc. case or whether the bankruptcy court's factual

determinations were correctly made. But historic traditional law allows for these petitioners' day in court; *Ashley v. City of Jackson*, 1983, 104 S. Ct. 255, 257 464 U.S. 900, 78 L. Ed. 2d 241. Likewise, legislative and administrative tribunals are permitted to decide matters involving "public rights," Congress may elect the forum; *see Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 15 L. Ed. 372 (1855).

Petitioner Jack Whitehorn had part ownership and subsequently 100% ownership and was president and sole director of WFDR, Inc. for 21 years. The building of a small radio broadcast business into a multimillion dollar property caused destructive health problems which resulted in open heart surgery in 1977.

On or about March 28, 1980, petitioner Jack Whitehorn entered into a stock option agreement with blood brother John F. Whitehorn, believing (under medication) the document was a "trust" for petitioner Jack Whitehorn and his family's benefit.

After petitioner disavowed the option agreement on or about May 8, 1990 by mailgram, respondent Garstin acted on authority of holder of said option which included a proxy (an irrevocable proxy, contained in the body of the option and not valid pursuant to Georgia law). Garstin filed a voluntary chapter 11 case in the United States Bankruptcy Court, Northern District of Georgia, Newnan Division on May 9, 1980. The bankruptcy court upheld the said proxy for purpose of respondents' filing said bankruptcy case. Garstin claimed to be elected to office of president and sole director by proxy holder.

According to information from sworn testimony, the option holder removed himself and refused to have anything else to do with the property on or about December 1, 1980. This left the respondents in the

corporate case to continue to operate the business for personal fraudulent enrichment. The said respondents had no ownership interest in said property. (Murphy Deposition record below) The respondents were never sanctioned by owner/petitioner Jack Whitehorn to serve in any capacity for the corporate property (which has no bearing on this case). More important to the case herein respondents did not serve in any representative capacity for petitioners over any property owned or recovered by "individual" Jack Whitehorn in petitioners' personal bankruptcy case.

Ownership or "rights" in property must be resolved by adversary proceeding, not by a plan or reorganization as respondents assert; *see In re Commercial Western Finance Corp.*, 761 F.2d 1329, 13 B.C.D. 352 (9 Cir. 1985). This petitioners' "property rights recovery" was done in the proper legal contex. (See July 31, 1987 order at Appendix 5.) This Court has held stock (certificate of interest in this instant case) is "property" for purposes of 11 U.S.C. § 1129(b)(2)(B)(ii) even if the firm has a negative worth; *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 208, 108, S. Ct. 963, 969, 99 L. Ed. 2d 169 (1988). All adversary proceedings interrelated to respondents' *res judicata* claims are discussed in detail *infra*.

The petitioners attempted to use the recovered stock or rights therein to reorganize their personal estate. Respondent Murphy objected. The Nevada Bankruptcy Court (petitioners' commencement court) insisted upon petitioners having physical "stock certificate in hand" and instructed petitioners to file the "Complaint to Compel Turnover of Property" as discussed herein. The discovery in the said turnover proceeding produced the evidence of "fraud" of "petitioners' property rights" and the instant complaint was filed.

The respondents only defense: "the doctrine of *res judicata*," *i.e.*, all is done, you (petitioners) are not lawyers, you don't know who we are; everything was taken care of in the WFDR case or should have been; we don't want to be bothered with you now.

Respondent Murphy is a chronic liar and the other respondents will forsake any truth in support of her misrepresentations. (Appendix 11/Murphy Deposition below) Respondents bias of *res judicata* is based on rhetoric rather than evidence. The model rules of professional conduct adopted by the House of Delegates of the American Bar Association on August 2, 1983 forbid a lawyer to counsel or to assist a client in conduct that the lawyer knows is fraudulent.

The evidence of wrongdoing is clear, unequivocal, and decisive beyond a reasonable doubt. It is left to the respondents to shoulder, if they can, the burden of proving they were justified in their actions; *Aikens v. Wisconsin*, 1904, 195 U.S. 194, 25 S. Ct. 3, 49 L. Ed. 154. Respondents have not and cannot comply, as clear evidence before the lower court shows:

> 1. The corporate bankruptcy court expressly rejected jurisdiction over FCC matters, the crux of the instant complaint herein; *res judicata* unavailable.
>
> 2. The "property rights" recovered by petitioners were attained by "*settlement*" as fully discussed.[6]

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[6] "*Settlement*" does not constitute a final decision on the merits. A court's order or judgment can never have any preclusive effect on future litigation unless that order or judgment constitutes a final decision on the merits; *see Ashe v Swenson*, 397 U.S. 436, 443, 90 S. Ct. 1189, 1194, 25 L. Ed. 2d 469 (1970); *United States v. United States*

Respondents' motion for judgment on the pleadings and/or for summary judgment was granted predominatly on the grounds that petitioners' complaint is barred by the doctrine of *res judicata*.[7]

Smelting Refining & Mining Co., 339 U.S. 186, 198, 70 S. Ct. 537, 544, 94 L. Ed. 750 (1950); *Jones v. Texas Tech Univ.*, 656 F. 2d 1137, 1141 (5th Cir. Unit A Sept. 1981).

The "property rights" have been moved from the Federal Communications Commission by fraud in direct conflict of Federal statutes. The Fifth Circuit has held congressional intent is vested with an administrative agency to regulate matters in its field; *see In re Braniff Airways, Inc.*, 700 F.2d 935, 10 B.C.D. 933 (5th Cir. 1983), rehearing denied 705 F.2d 450 (5th Cir. 1983). Whatever furthers the statute's primary objective must be the law; *Rodriguez v. United States*, 480 U.S. 522, 525-26, 107 S. Ct. 1391, 1393, 94 L. Ed 2d 533 (1987).

[7] The party moving for summary judgment has burden of informing court of basis for its motions and identifying pleadings and other record evidence which it believes demonstrate absence of genuine issue of material facts. FRCP 56; *Celotex Corp. v. Catrett* 477 U.S. 317, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986). In determining what is a material fact, the court must review the substantive law of the case for identification of which facts are critical and which facts are irrelevant; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986). Further, it must appear either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there is any uncertainty on this head in the record ... the whole subject-matter of the action will be at large and open to a new contention unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined; *Russell v. Place*, 1876, 94 U.S. 606, 608, 24 L. Ed. 214. (Here the precise point was not involved or determined.)

The standard for judgment on the pleadings is whether the plaintiff is capable of producing any facts in support of his or her claim that would ground relief; *Conley v. Gibson*, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957). (This has been done.)

The respondents seek to use *res judicata* to camouflage their noninterest in the "property rights" of petitioner by appearing before the FCC without any judicial authority and by fraudulent conduct

Petitioners used this Court's precedent case *Brown v. Felsen*, 442 U.S. 127, 60 L. Ed. 2d 767, 99 S. Ct. 2205 to define and extinguish any relevancy to *res judicata* pursuant to the instant complaint. Respondents Murphy and Law Firm: Smith, Gambrell & Russell lower court case No. 89-15630 choose as their statement of the doctrine of *res judicata* this Court's case *Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948) citation omitted; also, Restatement (Second) of Judgments §§ 17-26, 30-33 (1981). This Court cited the said Sunnen case in *U.S. v. Stauffer Chem Co.*, 1984, 104 S. Ct. 575, 579 N.5 464 U.S. 165, 78 L. Ed 2d 388, wherein the Court implied that it may support special rules "in the tax context" that do not have "general applicability outside of that context." The instant complaint "is not a tax preclusion issue." There is no preclusion of an issue that "was not actually litigated"; *Community National Bank v. Fidelity & Deposit Co.*, C.A. 9th, 1977, 563 F. 2d 1319, 1323.

Respondent Garstin lower court case No. 89-15767 chose 5th Circuit Court of Appeals cases, *Nilsen v. City of Moss Point, Mississippi*, 701 F.2d 556, 559 (5th Cir. 1983) (en banc); *Republic Supply Co. v. Shoaf*, 515 F.2d 1046 (5th Cir. 1987) and *Hotel Corp of the South v. Rampart 920, Inc.*, 46 Bankr. 758, 747 (E.D. La.); aff'd 781 F.2d 901 (5th Cir. 1985).

The contentions of the instant complaint and the only vital proposition is the "fraudulent transfer of an

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through groundless writings and execution of certain FCC (standard form) documents having assigned and transferred a *"valid"* FCC broadcast license through manifest deception. The property was obtained by fraudulent misrepresentation; *see Taybor v. Universal Exploration Co.*, 8th Cir. 1931, 48 F.2d 1047.

Deliberate fraud by the transferor in settling litigation with the obliger provides an added reason to deny preclusion; *Welch v. Mandeville*, 1816, 1 Wheat. (14 U.S.) 233, 4 L. Ed 79.

FCC broadcast license" by respondents -- whether the uncontradicted fraud is barred by the doctrine of *res judicata*; whether petitioners' United States Constitutional, Fifth Amendment rights will be subverted by the lower court decrees. The dues process and equal protection clauses apply to all federal operations; *see Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 55 S. Ct. 854, 79 L. Ed. 1593 (1935).

The *res judicata* confusion demands this Court's supervision and here is the basis that will conform to cases cited *supra* by all parties herein and will lay to rest permanently the gratuitous "doctrine of *res judicata*."

Jurisdiction: All pleadings, orders and other documents of record raised by respondents for *res judicata* to be applied were filed in or venue transferred proceedings to the United States Bankruptcy Court, Northern District of Georgia, Newnan Division. In the March 16, 1981 order (at Appendix 6) these petitioners expressly objected to the sale and violation of FCC law as the order recites: "The final ground for objection is that the proposed sale violates the rules and regulations of the Federal Communications Commission." The court overruled petitioners' objection and expressly rejected jurisdiction of FCC law wherein the court proclaimed "The final objection to the sale is based on the premise that the sale violates the rules and regulations of the FCC. **While the decision as to whether or not the sale does violate the rules of that body is not for this court.**" (Emphasis added.) The said order without exception invalidates *res judicata* in this action.

Further, in said order, the court sets out an unconstitutional injunction wherein the Court said: "IT IS HEREBY ORDERED AND ADJUDGED that all parties before the court and who have appeared in this proceeding are permanently restrained and enjoined from

instituting any suit or proceeding before any court or administrative agency." Pursuant to the Uniform Fradulent Conveyance Act § 6(4), a transfer is not made until the debtor has acquired rights in the asset transferred. The act requires the transferor to have rights in the asset transferred before the transfer is made for the purpose of this section. This provision makes clear that its purpose may not be circumvented by notice - filing or recordation of a document evidencing an interest in an asset to be acquired in the future; Cf. Bankruptcy Code § 547(e); U.C.C. § 9-203(1)(c).[8]

The next pertinent entanglement with *res judicata* confusion is to undertake what legal authority has jurisdiction to adjudicate FCC claims.[9]

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[8] In the said order, there is no contention that petitioners did not raise the issue of FCC law, i.e., Rules and Regulations of said administrative agency of the Federal Government. A mandated requirement to invalidate *res judicata* in this instant complaint.

Morever, A court's determination of its own jurisdiction is subject to the principles of *res judicata*; it generally may not be challenged in a collateral proceeding; see *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, U.S. 694, 102 S. Ct. 2099, 2104 N.9, 72 L. Ed. 2d 492 (1982); *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 60 S. Ct. 317, 319, 84 L. Ed. 329 (1940). This bar applies whenever the party challenging the judgment has the opportunity to raise the jurisdictional issue, but fails to do so; *Chicot County* 60 S. Ct. at 320.

Further if the first suit was dismissed for ... the want of jurisdiction, ... the judgment rendered will prove no bar to another suit; *Hughes v. U.S.*, 1866, 4 wall (71 U.S.) 232, 237, 18 L. Ed. 303.

The United States Constitution, Amendment 1, guarantees the right to petition the government for a redress or grievances.

[9] Without any equivocation the Federal Communications Commission is not, strictly, a court but it has quasi-judicial powers and its proceedings must satisfy the pertinent demands of due process; Title 47 U.S.C. § 151 et seq.; see *National Broadcasting Co. v. U.S.*, N.Y. 1943, 63 S. Ct. 997, 319 U.S. 190, 87 L. Ed. 1334; *L. B. Wilson, Inc. v. FCC*, 83 U.S. App. D.C. 176, 170 F.2d 793.

The respondents have brought questions as to the ownership or "property rights" of the FCC license which is the complained subject of fraud.[10]

Petitioner Jack Whitehorn owned 100% of WFDR, Inc. stock prior to March 28, 1980. There is no dispute to this fact.

On March 28, 1980 a stock option was executed in favor of blood brother John F. Whitehorn.

On May 9, 1980 WFDR, Inc, respondent Garstin acting as president and sole director elected by option holder, which included a proxy (discussed *supra*), filed

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As set out *supra*, the bankruptcy court that respondents rely on to apply *res judicata* herein, appropriately rejected jurisdiction to FCC matters. Accordingly, issue preclusion could not rest on a finding that the prior court itself recognized was not necessary to its decision; see *Minnis v. U.S. Dept. of Agriculture*, C.A. 9th, 1984 737 F.2d 784, 786 N.1., certiorari denied 1985, 105 S. Ct. 2112, 471 U.S. 1053 85 L. Ed. 2d 477.

[10] "Property Rights" *de jure* is abundantly clear as to the possession of "*valid issued FCC broadcast licenses*." The ownership of property whether the property be real or personal, carries with it the right to exclude others from its possession, use or enjoyment. The right of ownership is a right guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution; see *L. B. Wilson v. FCC*, 170 F.2d 793 (C.A.D.C.). Although a radio broadcasting station license does not under the Communications Act confer an unlimited and indefeasible property right, the right is more than a mere privilege or gratuity; *Communications Act of 1934*, §§ 1 *et seq.*; 301, 309(b)(1,2), 47 U.S.C. §§ 151 *et seq.*; 301, 309(b)(1,2); see *FCC v. Sanders Bros. Radio Station*, 1940, 309 U.S. 470, 60 S. Ct. 693, 84 L. Ed. 869. The FCC license, the subject matter of the instant complaint was "*valid*" at time of fraud. This court has recognized at various points in its opinion the *existence of a private right or interest in a station licenses while his license is outstanding* (italics supplied); see *FCC v. Pottsville Broadcasting Co.*, 1940 309 U.S. 134, 60 S. Ct. 437, 84 L. Ed. 656.

and was granted chapter 11 protection (11 U.S.C. chapter 11) United States Bankruptcy Court, District of Georgia, Newnan Division.

On July 23, 1980 an adversary proceeding was filed in the WFDR, Inc. bankruptcy case No. 80-001367 complaining, *inter alia*, of sale and rightful ownership of all the stock of WFDR, Inc. debtor-in-possession. The said adversary proceeding was styled, *In Matter of WFDR, Inc. Debtor-in-Possession, Jack Whitehorn Plaintiff vs. John F. Whitehorn, Robert M. Garstin and WFDR, Inc. Debtor-in-Possession Defendants.* The said court abstained from hearing said proceeding. (District court order characterized as not prosecuted further.)

Defendant WFDR, Inc. Debtor-in-Possession filed a counterclaim August 18, 1980 (still pending). (See Appendix 8.)

On October 6, 1980 relief was granted for petitioners (11 U.S.C. chapter 11) United States Bankruptcy Court for the District of Nevada, bankruptcy case No. BK-S-80-0936.

On December 8, 1980 an adversary proceeding was filed in the United States Bankruptcy Court for the District of Nevada complaining, *inter alia*, of recovery of 100% of the WFDR stock. Said proceeding was subsequently transferred to the Northern District of Georgia. The proceeding was styled *Jack R. Whitehorn and Mary Ruth Whitehorn Debtor, Plaintiff v. John F. Whitehorn Defendant.* Said proceeding concluded by "*settlement*" as admitted by respondents.

On April 3, 1986, by Court instruction, an adversary proceeding was filed in petitioners' bankruptcy case, being adversary proceeding No. 86-0045 "Complaint to Compel Turnover of Property." The complaint was

styled *Jack R. Whitehorn and Mary Ruth Whitehorn, Debtor-in-Possessions, Plaintiffs v. Margaret H. Murphy and Law Firm: Smith, Gambrell & Russell, Defendants*. The said complaint sought physical turnover of the WFDR stock certificates. The said proceeding was subsequently transferred to the Northern District of Georgia. This court denied certiorari to appeals of trial court order of July 31, 1987. (Appendix 5) Said order did not reject claims to FCC licenses as district court characterizes in summary judgment order. (Appendix 2) Court was deceived by respondents proposed order discused *supra*.

After ownership of stock or "property rights" thereto was completely adjudicated by "*settlement*" and discovery of fraud of the FCC broadcast licenses the instant complaint was filed in the United States District Court for the District of Nevada on July 1, 1988.

Respondents maintain *res judicata* in the following actions at law:

Respondents challenge petitioners' ownership of WFDR, Inc. stock and "rights" to broadcast licenses even after "*settlement*" *supra*.

The respondents argue the "Amended Plan of Reorganization of WFDR and Confirmation (no appeal perfected by petitioners) thereof bars the instant complaint. The argument erroneously emphasized the said amended plan expressly provided for transfer of WFDR's FCC licenses. The court rejected jurisdiction of FCC law *supra*, *res judicata* precluded.

Further, respondents argue the WFDR application to settle claims and order approving same bars the instant complaint, alleging $35,000 paid to petitioners' attorneys from sale of WFDR, Inc. assets redeemed petitioners' ownership or "property rights." The word "redeem or

redeemed" is not found in the said order. Respondents *animo* try to change the legal context of said order.

Applications *animo* were filed by respondents with the FCC, first application filed on or about April 29, 1981.

The second filing by respondents before the FCC was made July 16, 1981. Said fraudulent applications were filed some 60 days before the amended plan order of consumation was entered; *see Terry, Intent to Defraud*, 1915, 25 Yale L.J. 87, 94 -- *res judicata* not possible. Said applications and writings were of *damnum* to petitioners as discussed herein.

The FCC acknowledged with letter to petitioners dated August 14, 1981. (Appendix 9) One who has been permitted to intervene but denied the right to present evidence and examine witnesses and had his rights determined in a matter in which there was no evidentiary hearing has been denied due process; *In re Wildman*, 793 F.2d 157 (7 Cir. 1986).

Now respondents proffers the "Complaint to Compel Turnover of Property." In respondent Murphy's deposition (Record below), Attorney Joyce B. Klemmer, a member of the respondent law firm and representing Murphy at said deposition, made the following statement during the proceedings: "Mr. Whitehorn, on the record, what relevance does an FCC application have to do with your turnover proceedings?" Certainly, no *res judicata* claim here.

The trial court, the United States Bankruptcy Court, Northern District of Georgia, Newnan Division, Judge W. H. Drake, Jr. presiding, entered an order July 31, 1987. (Appendix 5) Said order is a complete judicial construction of the WFDR, Inc. bankruptcy case, all

adversary proceedings therein and all adversary proceedings filed in the petitioners' case in Nevada Bankruptcy Court. (All Nevada adversary proceedings were transferred to the Georgia Bankruptcy Court for adjudication.[11]

The respondents' mischaracterize the "Complaint to Compel Turnover of Property" as "an avoidance action" presumably since the said court, in the last paragraph of said order, granted a motion to bar the "Complaint to Compel Turnover" by statute of limitations pursuant to 11 § 549(d)(1). However, an action for fraud does not accrue until discovery of the fraud; *see Magna Leasing, Inc. v. Staten Island Mail*, 428 F. Supp. 1039, affirmed 563 F.2d 567. The substance of said order is the last decree entered by Judge Drake in the WFDR, Inc. case *supra*. **The mass of peremptory evidence mandates the doctrine of** res judicata **is inappropriate as a matter of law applied**

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[11] The July 23, 1980 adversary proceeding was resolved by the court's abstaining; final order entered January 26, 1984; *res judicata* precluded. WFDR, Inc. counterclaim validates no change in corporate stock ownership or FCC notification of same. Petitioners Jack and Mary Whitehorn granted relief October 6, 1980 (11 U.S.C. chapter 11); 11 § 362 in force date of said order; Garstin executed Ownership Report (FCC Form 323) certifying petitioner Jack Whitehorn 100% ownership of stock *infra*. December 8, 1980 adversary proceeding resolved by "*settlement*" which does not constitute a final decision on the merits as discussed *supra*. Therefore, no preclusive effect. Further, "*settlement*" is a contract as discussed *infra*. When a contractual right is terminated, the contract right is transformed into something else, or destroyed altogether; *see Schokbeto Indus., Inc. v. Schokbeton Prods. Corp.*, 466 F.2d 171 (5th Cir. 1972). The issues of the instant complaint and the bankruptcy proceedings respondents assert are totally different. The party asserting estoppel bears the burden of pleading and proving the identity of issues decided in the previous action. Preclusion was denied; *Little v. U.S.*, CA 9th 1986, 794 F.2d 484, 486-487. Not *res judicata* to instant complaint.

to the instant complaint. In further support of the evidence *de facto*, the said July 31, 1987 order expressly sets out:

> "The complaint . . . seeks the turnover under 11 U.S.C. § 542 of one hundred percent (100%) of the stock of WFDR, Inc. which is in the form of certificate No. 1 for 50 shares and certificate No. 2 for 5000 shares, as well as all assets said stock owns."

"Margaret H. Murphy and Law Firm of Smith, Cohen, Ringle, Kohler & Martin acted as attorneys for the corporate debtor-in-possession WFDR, and as estate administrator in WFDR's chapter 11 case. Smith Cohen, Ringle, Kohler & Martin is the predecessor law firm to defendant Smith, Gambrell & Russell."

Res judicata does not apply when the parties appeal in one action in a representative capacity and in a subsequent action in an individual capacity; *Clark v. Amoco Production Co.*, 794 F.2d 967, 973 (5th Cir. 1986).

The Court held: "Jack Whitehorn was the original sole shareholder of WFDR."

On October 6, 1980, the same date petitioners herein relief was ordered in the United States Bankruptcy Court for the District of Nevada, respondent Robert M. Garstin executed FCC Form 323 "Ownership Report" and on October 15, 1980 filed same pursuant to FCC directive dated July 21, 1980. The said form requires execution subject to "any person who willfully makes false statements on this report can be punished by fine or imprisonment; United States Code Title 18, § 1001 (formerly § 80)." The said ownership report set out:

"The only change involved is that licensee is now under the control of WFDR, Inc. debtor-in-possession, chapter 11, pursuant to order of United States Bankruptcy Court for Northern District of Georgia, Newnan Division."

Respondent Garstin was acting by and through proxy holder's authority included in the body of stock option agreement which subsequently was judiciously annulled through "*settlement*" as discussed *supra*.

Petitioner, owner of WFDR, Inc. stock, had by written document and verbal telephone conversation directed respondent Garstin to remove himself from the corporate property.

The said "FCC ownership report" certified to the FCC, pursuant to the preexisting ownership report *sine qua non* that petitioner Jack Whitehorn is owner and under full control through Garstin as elected officer and director.[12]

The Garstin control supposition is fraudulent. However, the FCC, within the premises set out

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[12] Parties whose rights are to be affected are entitled to be heard, it is equally fundamental that the right to notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner"; *see Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 1191, 14 L.Ed. 2d 62. Pursuant to Title 47 § 310, the FCC is precluded from considering third party as competing applicant for assignment . . . upon application to transfer permit if the permit continues to be valid; *see MG-TV Broadcasting Co. v. F.C.C.*, 1968, 408 F.2d 1257, 133 U.S. App. D.C. 54. The subject broadcast licenses were "valid" at time of fraud.

hereinabove, administratively granted WFDR, Inc. to WFDR, Inc. debtor-in-possession routinely.[13]

The Court further states in order of July 31, 1987: "Following approval by the FCC of the transfer of control of WFDR."[14]

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[13] The FCC retains continuing jurisdiction over broadcast license, despite chapter 11 proceeding; *see LaRose v. FCC*, 494 F.2d 1145 (D.C. Cir. 1974). Moreover, FCC license is not property of corporate debtor, not "property of the corporate estate"; *In re D. H. Overmyer Telecasting Co., Inc.*, 35 B.R. 400 (Bkrtcy. 1983). The fradulent application was filed with the FCC using "FCC Form 315," Application for Voluntary Assignment or Transfer of Control; FCC Rule § 73-3540(d). To complete the transfer the FCC required the licenses be returned from debtor-in-possession to WFDR, Inc. FCC Short Form 316, along with respondent Murphy's fraudulent writing at Appendix 11 was filed pursuant to FCC Rules § 73-3540(f)(4) which sets out "corporate reorganization which involves no substantial change in the beneficial ownership of the corporation." "Fraud" of the petitioner Jack Whitehorn's "property rights" to the apex. Respondents Murphy and Garstin fraudulently appeared before the FCC July 16, 1981 and removed, by writing and said FCC Form 316, WFDR, Inc. debtor-in-possession back to WFDR, Inc. pursuant to Title 18 § 1001. Said FCC form sets forth "Willful false statements on this form are punishable by fine and imprisonment." This FCC filing, in fact, removed the United States Bankruptcy Court, Northern District of Georgia, Newnan Division from the WFDR, Inc. case (*i.e.*, dismissal of the case) and certified same before the FCC, in total violation of said U.S.C. 18 § 1001 -- Thus allowing petitioner Jack Whitehorn's "property rights" to be assigned and transferred in the course of carrying out fraud under same cerification to U.S.C. 18 § 1001.

[14] The Court did not order or file any proceedings before the FCC. The said Court rejected jurisdiction of FCC matters *supra*. The respondents without any judicial authority and without any claim of "ownership rights" filed assignment and transfer application by and through "fraud." It is simple equity that a wrongdoer should disgorge his fraudulent enrichment; *see Dickson v. Patterson*, 1896, 160 U.S. 584, 16 S. Ct. 373 40 L.Ed. 543.

The gist of the complaint at bar: The assignment and transfer of the FCC broadcasting licenses, "A conferred property right," was consummated by and through "Fraud" of respondents herein (Complaint at Appendix 4). Respondents have no judicial authority to assign and transfer. (Murphy sworn deposition testimony record below) Murphy, Law Firm: Smith, Gambrell & Russell nor Garstin claim any ownership to said "property rights." (Deposition record below) Petitioner Jack Whitehorn "adjudicated by "*settlement*" owner of the "FCC property rights" (contract discussed *supra*) was not privy to any appearance before the FCC. See petitioner Jack Whitehorn's letter to FCC. (Appendix 10). Said letter and other correspondence by petitioner triggered a reply letter from FCC to petitioner Jack Whitehorn dated August 14, 1981. (Appendix 9)[15] The said letter set forth petitioner's writings were procedurally defective and considered as informal objections and cannot be *res judicata* in the complaint at bar.[16]

The FCC was not aware of the "fraud" set out *supra*, as well as petitioners' unawareness. The written instrument by the FCC peremptorily identified "ownership" and set out: "concerning your claims of ownership over WFDR, Inc. . . . the Commission will not defer action on assignment or transfer applications pending final resolution of disputed claims . . . Such claims must be settled privately or in a court of competent jurisdiction using local law."

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15 Under the parol evidence rule, the testimony by said letter is sanctioned; see *Schongalla v. Hickey*, 60 F. Supp. 814 (N.D.N.Y 1943).

16 Issue preclusion could not arise as to an issue that was not raised and thus was not decided; *Norfolk & Western Ry. v. U.S.*, C.A.D.C. 1985, 768 F.2d 373, 377-378, certiorari denied 107 S. Ct. 270, 479 U.S. 882, 93 L. Ed. 2d 247.

The ownership question had to be resolved before any formal and proper appearance before a tribunal could be litigated.[17]

The ownership or "property rights" were not final until "*settlement*" was entered by the court January 26, 1984. (See July 31, 1987 order at Appendix 5.)[18] *Res judicata* precluded.

The said July 31, 1987 order further set out: "The cancellation of the existing WFDR stock did not affect rights because Jack Whitehorn received in its place certificates of interest . . . It is true as Whitehorn argues, that the question of ownership of stock was ultimately decided in Jack Whitehorn's favor . . . It thus appears that **the orders in the WFDR case did not affect Jack Whitehorn's property rights.**" (Emphasis added.)

Respondent Garstin, *inter alia*, and by actions *supra* appeared before the FCC. Respondents Murphy and Law Firm: Smith, Gambrell & Russell by a fraudulent writing (at Appendix 11) wherein WFDR, Inc. debtor-in-possession was by fraud returned to WFDR, Inc., taken our of bankruptcy in the eyes of the FCC. Ownership 100% by petitioner Jack Whitehorn pursuant to FCC docket *supra*; licenses could not be assigned or transferred pursuant to statutes and rules of FCC set out herein. Fraud, "the significance of the act" was with full knowledge and without judicial authority as sworn to by

---

[17] Petitioners could not file a plan of reorganization until "*settlement*" January 26, 1984 In a case involving corporate stock and claims by others, the court held the dispute must be settled before the reorganization; see *In re Burton Coal*, 126 F.2d 447 (7th Cir. 1942).

[18] A question cannot be held to have been adjudged before an issue on the subject could possibly have arisen; see *Third National Bank v. Stone*, 1899 19 S. Ct. 759, 760, 174 U.S. 432, 434, 43 L. Ed. 1035.

Murphy. (Deposition, record below) The said writing was filed with the FCC as part of an application to fraudulently assign and transfer "petitioners property rights," the FCC broadcast licenses -- the crux of the instant complaint.[19]

The constitutional privilege cannot be legislatively nullified, whether in bankruptcy or in any other situation; *Butcher v. Bailey*, 753 F.2d 465, 12 B.C.D. 943 (6 Cir. 1985) cert. dismissed 473 U.S. 925, 106 S. Ct. 17, 87 L. Ed. 2d 697 (1985). The privilege applies in bankruptcy as well as a broad range of other civil proceedings as well as in criminal matters; *McCarthy v. Arndstein*, 266 U.S. 34, 45 S. Ct. 16, 69 L. Ed. 158 (1924); *In re Martin-Trigona*, 732 F.2d 170, 11 B.C.D. 1010 (2 Cir. 1984).

CONCLUSION

For the reasons stated above, the complaint at bar cannot be barred by the doctrine of *res judicata*. If dismissal of action for insufficient service of process is correct as affirmed by the lower court, then further findings of fact and conclusions of law would be indecisive and *res judicata* estoped.

The lower court misapplied the general rules of *res judicata*, departed from traditional principles of statutory

---

[19] The Federal Communications Commission is not strictly, a court but it has quasi-jurisdiction powers and its proceedings must satisfy the pertinent demand of due process; Title 47 U.S.C. § 151 *et seq*; *L. B. Wilson, Inc. v. Federal Communications Commission*, 83 U.S. App. D.C. 176, 170 F.2d 793. The FCC is an administrative agency of the Federal Government and it was held in *Melvin v. Penle*, 76 U.S. App. D.C. 154, 130 F.2d 423, 143 A.L.R. 149 that a cause of action for malicious prosecution or the malicious use of legal proceedings may be predicated upon the prosecution of an administrative proceeding. To the same effect, see *National Surety Co. v. Page*, 4th Cir. 58 F.2d 145.

interpretation and judicial review of Federal Agency Construction of Statutes.

To allow the instant case to stand as affirmed would open the door for all third-party applicants to encroach on any "valid FCC broadcast license" and interfere with the intent of Congress, a procedural right guaranteed by the due process clause; *U.S.C.A. Const. Amend 5.* Accordingly, because of the significant administrative law questions raised by this case and the importance to the Federal Communications Commission, certiorari should be granted; *see* __U.S.__, 110 S. Ct. 321, 107 L. Ed. 2d 311 (1989).

A writ of certiorari is meritorious in this instant case.

Respectfully submitted,

Jack R. Whitehorn
Appearing Pro se
5141 Indian River Drive, Box 377
Las Vegas, Nevada 89103-6148

(702) 367-2102

CERTIFICATE OF SERVICE

The undersigned hereby certified that I have served the requisite number of copies of the foregoing Petition for Writ of Certiorari on:

Evan J. Wallach
Rodney M. Jean
Lionel Sawyer & Collins
1700 Valley Bank Plaza
300 South Fourth Street
Las Vegas, Nevada 89101

Kenneth L. Millwood
Edward C. Brewer, III
Smith, Gambrell & Russell
2400 First Atlanta Tower
Atlanta, Georgia 30383

Carmine J. Colucci
Colucci & Amador
629 S. Sixth Street
Las Vegas, Nevada 89101

by placing same in the United States mail, first class postage prepaid, this 15 day of November 1990. I further certify that all parties required to be served have been served.

Jack R. Whitehorn

(2)

90-820

Case No. _____

Supreme Court, U.S.
FILED
NOV 15 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term 1990

—o—

Jack R. Whitehorn and
Mary Ruth Whitehorn

Petitioners

vs.

Margaret H. Murphy,
Law Firm: Smith, Gambrell & Russell and
Robert M. Garstin

Respondents

—o—

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

—o—

APPENDIX

—o—

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APPENDIX 1

United States Court of Appeals
for the Ninth Circuit Order
Entered August 24, 1990

Order sets forth no opinion
or conclusion of law

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Cases No. 89-15630 and 89-15767

District Court Case No. CV-88-0541-PMP

MEMORANDUM*

Filed August 21, 1990

Appeal from the United States District Court for the District of Nevada -- Philip M. Pro, District Judge, Presiding

Submitted July 19, 1990**
San Francisco, California

Before: Tang and Noonan, Circuit Judges, and Waters***, District Judge

We affirm the district court on the basis of its decision. Like the district court, we conclude res judicata bars the Whitehorns' complaint. We also agree with the district court that the Whitehorns improperly served the appellees.

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R. 36-3.

** The panel finds this case appropriate for submission without oral argument pursuant to Fed. R. App. P. 34(a) and Ninth Cir. R. 34-4.

*** Honorable Laughlin E. Waters, Senior United States District Judge for the Central District of California, sitting by designation.

Because this appeal is frivolous, no petition for rehearing will be entertained. The Whitehorns are hereby advised that further litigation of the WFDR's sale will result in sanctions. **AFFIRMED.**

APPENDIX 2

United States District Court
District of Nevada Order
Entered April 26, 1989

Appeals court simply affirmed
this order which substantially
followed respondents' defective
order provided to said court and
is not consistent with this
Honorable Court's precedent cases
pursuant to the complaint at bar

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Case No. CV-S-88-541-PMP (RJJ)

ORDER

Entered April 26, 1989

On October 21, 1988, Defendant/ Counterclaimants MARGARET H. MURPHY and SMITH, GAMBREL [sic] AND RUSSELL filed a Motion for Judicial Notice, for Judgment on the Pleadings or Summary Judgment, and for Preliminary and Permanent Injunctive Relief or, in the Alternative, to Dismiss or for Transfer (#28 and #29). On October 24 and November 25, 1988, Plaintiffs filed Responses in opposition to Defendants' Motion (#30 and #37). On November 22, 1988, Defendant/Counterclaimants filed a supplement to their Motion (#36), and a second supplement on January 25, 1989 (#42), to which Plaintiffs responded on February 1, 1989 (#43). Additional supplements to their Motions were filed by Defendant/ Counterclaimants on February 15, 1989 (#45 and #46), and again on March 3, 1989 (#49). On March 10, 1989, a hearing was conducted regarding Defendant/ Counterclaimants' Motion, at which Plaintiffs were permitted to file an additional supplement in opposition. Additionally, Defendant/Counterclaimants have submitted Proposed Orders which they suggest may be appropriate to resolve the Motions before the Court. The Court agrees and in the following Order will borrow substantially from the Proposed Orders submitted.

This action arises out of claims by Plaintiffs to the ownership of the stock and broadcasting licenses of WFDR, Inc., formerly a Georgia corporation, which owned and operated radio stations in Manchester,

Georgia. Moving Defendants first became involved by virtue of legal representation of WFDR, Inc., as a Chapter 11 debtor in a related proceedings in In Re: WFDR, Inc., filed eights years ago in the Northern District of Georgia. They later became Defendants themselves in litigation by Plaintiffs who sought to obtain the WFDR stock and assets transferred pursuant to a confirmed plan of reorganization on August 18, 1981.

Plaintiffs' Complaint sounds in fraud, conspiracy and racketeering activity. Plaintiffs' claims can be summarized as follows:

> 1. that they were unlawfully deprived of free and clear ownership of the WFDR, Inc. stock;
>
> 2. that they were deprived of "an economic benefit gained through said adversary proceeding [a 1980 preference action] by having The Federal Communications Commission license[s] transferred by fraudulent means," which licenses were not property of the WFDR estate;
>
> 3. that these Defendants are guilty of wrongdoing in connection with litigation over the WFDR stock; and
>
> 4. that these Defendants violated the automatic stay imposed when the Whitehorns' personal bankruptcy was filed.

The Plaintiffs seek damages for deprivation of the WFDR stock and assets interest, punitive damages,

attorneys' fees and expenses of litigation, costs, and further unspecified relief.

The Defendants contend that the above claims are barred by res judicata arising out of the WFDR bankruptcy proceedings and related proceedings, including a 1986 adversary proceeding against them. They further contend that the Whitehorns are engaged in frivolous and repetitive litigation, and have filed a Counterclaim seeking, among other things, injunctive relief against further litigation by the Whitehorns relating to the ownership of WFDR, Inc., its stock or its assets.

The Plaintiffs are residents and citizens of the State of Nevada, and are within the jurisdiction of this Court for that reason. They also are within the jurisdiction of this Court by virtue of having filed the present Complaint.

Each of the Defendants is a citizen of the state of either Texas or Georgia. The amount in controversy exceeds $10,000, exclusive of interest and costs. The claims stated in the Counterclaim arose in this District.

Judicial Notice of the following adjudicative facts is appropriate:

(a) that the pleadings, orders and other documents referred to in this Order are authentic genuine, true and correct copies of the originals filed and entered in the cases and proceedings in which they are styled;

(b) that those pleadings, orders and other documents were in fact filed and entered in the cases and proceedings in which they are styled.

The above facts are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2). The Defendants have requested that the Court take judicial notice of them, and have supplied the Court with the necessary information. Id. 201(d). The Plaintiffs have been given prior notification of the Defendants' motion for judicial notice, and have had an opportunity to respond. Id. 201(e).

On March 28, 1980, Plaintiffs Jack R. Whitehorn and Mary Ruth Whitehorn executed an agreement in favor of Dr. John F. Whitehorn, Jack Whitehorn's brother. The agreement included, among other things, an irrevocable proxy granting to John Whitehorn voting authority over the Whitehorns' 100% stock interest in WFDR, and is titled "Stock Option Agreement."

On May 9, 1980, WFDR, Inc. facing significant financial problems, filed a voluntary petition under Chapter 11 of the United States Bankruptcy Code, Case No. 80-00136N, in the United States Bankruptcy court for the Northern District of Georgia.

On July 22, 1980, Plaintiff Jack Whitehorn filed an adversary proceeding in the WFDR Chapter 11 proceedings, referred to as the stock option/fraud action, against John Whitehorn, Robert M. Garstin and WFDR, Inc. as Debtor-in-Possession. The next day, he filed a motion demand that the court shorten the time for filing answers, which was not ruled upon.

On August 18, 1980, the various Defendants in that proceeding filed their answers. WFDR and John Whitehorn counterclaimed against Jack Whitehorn for, among other things, wrongful interference with the business of WFDR and with the process of reorganization. On September 2, 1980, the Georgia

Bankruptcy Court set trial for November 13-14, 1980. In the middle of discovery and trial preparation in the Georgia stock option/fraud action, on October 6, 1980, the Whitehorns filed a voluntary petition under Chapter 11 in Nevada. Only a week prior to trial, on November 5, 1989 [sic], Plaintiff Jack Whitehorn obtained a stay of the stock/option fraud action, and the action was not prosecuted further.

Plaintiffs Whitehorn did not contend in their personal bankruptcy that the FCC broadcasting licenses were assets of their estate, and did not include the licenses in their initial bankruptcy schedule of assets. To the contrary, it is clear that the broadcasting licenses were issued in the name of WFDR, Inc., and at no time have they been owned by either of Plaintiffs Whitehorn.

On January 30, 1981, WFDR filed an application to liquidate its assets in the Georgia bankruptcy proceedings. Plaintiff Jack Whitehorn objected to the application, claiming sole and rightful ownership of WFDR. Following notice and a hearing the Bankruptcy Court entered an order on Mach 16, 1981, approving the sale of assets for $790,000.00 to Lake George Corporation, predecessor in interest to Provident Broadcasting Company, and allowing its restructure as a stock transaction or merger. The order likewise affirmed the validity of the irrevocable proxy contained in the Stock Option Agreement, expressly finding that it was "valid on its face." On April 8, 1981, the Bankruptcy Court denied Plaintiff Jack Whitehorn's motion for a new trial, for alteration or amendment of the judgment and for additional findings of fact. Plaintiff Jack Whitehorn noticed an appeal from both orders, but did not seek a stay of the sale pending resolution of the appeal.

On May 27, 1981, WFDR filed an Amended Plan of Reorganization, which implemented the sale Orders by

cancellation of the outstanding stock of WFDR and issuance of new stock to the successful purchasers. The Amended Plan provided that ownership interests theretofore represented by stock certificates would be represented by certificates of interest evidencing entitlement to the net proceeds of the liquidation, after payment of debts and administrative expenses owed by WFDR.

Plaintiff Jack Whitehorn filed objections to the disclosure statement and to confirmation of the Amended Plan on grounds, among others, that the management of WFDR which had filed the Chapter 11 petition lacked the requisite corporate authority. On June 29, 1981, the Bankruptcy Court entered an order Whitehorn's the Amended Plan over Plaintiff Jack Whitehorn's objections. In the order confirming the Amended Plan, the Bankruptcy Court acknowledged the pending adversary proceedings between Plaintiff Jack Whitehorn and Dr. John Whitehorn concerning the ownership of the WFDR stock, but stated that even if "Jack Whitehorn is proven to e the owner of all the stock of WFDR, Inc., despite his objection to the plan of reorganization, the plan should be confirmed pursuant to 11 U.S.C. § 1129(b)(2)(C)." No appeal was taken from that order, and the Amended Plan was thereafter fully consummated on August 18, 1981.

By Order dated September 18, 1981, the United States District Court for the Northern District of Georgia dismissed Plaintiff Jack Whitehorn's appeal of the orders approving the sale of assets as moot, "in that the Amended Plan providing for the sale of the stock in lieu of a sale of the assets had been approved and consummated." The District Court also noted that the order approving the sale of stock had not been appealed and no stay of that sale had been obtained. On August 17, 1983, the United States Court of Appeals for the Eleventh Circuit affirmed the district court's order

dismissing the appeal as moot, because the order confirming the Amended Plan had not been appealed and because the sale authorized and implemented by the Amended Plan had not been stayed.

On July 14, 1983, the present Defendants and the Committee of Unsecured Creditors of WFDR jointly filed an application to settle certain claims against the WFDR estate. The settlement provided, among other things, that upon partial payment of certain administrative and unsecured claims of Dr. John Whitehorn, Dr. John Whitehorn would relinquish any claim to the provisions of the Amended Plan. Plaintiff Jack Whitehorn objected to the application but the Georgia Bankruptcy Court overruled his objections and approved final settlement of the claims.

Ultimately, the ownership interest in WFDR, evidenced by the certificates of interest issued pursuant to the confirmed Amended Plan at closing on August 18, 1981, were redeemed by the payment of $35,000 to Plaintiff Jack Whitehorn from the proceeds generated subsequent to the sale to Provident. The $35,000 payment was specifically authorized by an order entered on May 6, 1983, in the Whitehorns' personal bankruptcy case by the United States Bankruptcy Court for the District of Nevada, and by orders entered on January 26, 1984, and February 16, 1984, in the WFDR case in which the Georgia Bankruptcy Court approved the settlement in recognition and satisfaction of Plaintiff Jack Whitehorn's interest in WFDR. The proceeds from the liquidation were paid to Plaintiffs' attorneys for the benefit of Plaintiffs' individual estate and, on November 15, 1984, a final decree was entered closing the state of WFDR.

The Plaintiffs' second claim for relief appears to be based upon a certain order entered by the Georgia

Bankruptcy Court in an action against Dr. John F. Whitehorn. A complete review of those proceedings discloses, however, that the Whitehorns rely upon an order that was, among other things, superseded in its entirety both by reversal on appeal and by the WFDR bankruptcy proceedings.

On December 11, 1980, in the District of Nevada, Plaintiffs Jack and Mary Whitehorn initiated a second adversary proceedings against Dr. John Whitehorn contesting ownership of the stock and control of WFDR. On January 30, 1981, the Nevada Bankruptcy Court transferred the Nevada adversary proceeding to the Northern District of Georgia for consolidation. The transferred proceedings are referred to as the "preference action."

The Georgia Bankruptcy Court held a trial of the preference action on December 16, 1981, and January 27, 1982. On August 12, 1982, that court signed an order holding that the stock option was a preferential transfer and therefore avoidable pursuant to 11 U.S.C. § 547. On May 27, 1983, however, the District Court vacated that order and remanded the proceeding to the Bankruptcy Court for further findings of fact. The Bankruptcy Court thereafter declared, in an order dated January 25, 1984, that the preference action was moot in view of the consummation of the settlement, approved by the Bankruptcy Court, in which John Whitehorn relinquished any claim based upon the certificates of interest. The Plaintiffs filed no appeal from the January 25 order.

This matter lay dormant for nearly a year and a half after the final decree in the WFDR bankruptcy proceedings. Then, on April 3, 1986, the Plaintiffs filed a "complaint to compel turnover of property" in the Bankruptcy Court for the District of Nevada. They sought "one hundred percent (100%) of WFDR, Inc.

stock turned over or sold to [sic: ("by")] Defendants named in the caption of this proceeding [Margaret H. Murphy and Law Firm: Smith, Gambrell & Russell"]." The proceedings in fact were a complaint to avoid the earlier transfer of the WFDR stock to Provident Broadcasting Company pursuant to the WFDR Amended Plan of Reorganization, and so are referred to here as the "avoidance proceedings."

The avoidance proceedings contended that Plaintiff Jack Whitehorn was the sole owner of all WFDR stock, and that the stock was subject to the automatic stay of 11 U.S.C. § 362 as of October 6, 1980, when Plaintiffs filed their personal bankruptcy. The avoidance complaint further made reference to the 1980 preference action that Plaintiffs had filed against Dr. John Whitehorn for the purpose of recovering the WFDR, Inc. stock. The Nevada Bankruptcy Court transferred the avoidance proceedings to the Northern District of Georgia by order dated December 16, 1986.

On July 31, 1987, United States Bankruptcy Judge W. Homer Drake, who had presided over the WFDR bankruptcy proceedings, entered an order rejecting the Plaintiffs' claims to possession of the WFDR stock and "all assets of said stock owned," including the FCC licenses. This order is the most complete summary of the complex proceedings that has been held to that date. Judge Drake framed the issues as follows:

> (1) whether the Georgia Bankruptcy Court had the authority to dispose of the stock and "'all assets of said stock owned'" in view of the automatic stay in view of the automatic stay in Whitehorns' personal bankruptcy;

(2) whether such claims were barred by the doctrine of res judicata as a result of orders entered in the WFDR bankruptcy; and

(3) whether the Whitehorns' claims to the stock or assets were barred by the statute of limitations in 11 U.S.C. § 549(d)(1).

The court reasoned that "Whitehorn's claims challenging the sale of assets or the cancellation of his stock . . . are . . . barred by res judicata if this Court had jurisdiction to enter those orders." Judge Drake concluded that the Georgia Bankruptcy Court had such jurisdiction, and that "this Court entered no Orders and The Defendants took no action which would required that the stay be lifted in Whitehorn's individual case in Nevada."

The Georgia District Court affirmed Judge Drake's opinion and judgment in an order dated December 23, 1987. The Eleventh Circuit affirmed on May 26, 1988, finding that the Whitehorns' appeal was "frivolous." The panel observed that "[a]ppellants continue to litigate an issue that was resolved long ago in the reorganization proceedings of WFDR. Accordingly, we award double costs against the Appellants." The court of appeals has denied rehearing en banc, and Plaintiffs have filed a petition for certiorari in the United States Supreme Court.

It is clear to this Court that Plaintiffs are now engaged in the "fourth or fifth generation of lawsuits" involving claims related to the ownership of WFDR, Inc., its stock, or its assets. Plaintiffs have previously litigated these issues to at least four separate conclusions in ten different proceedings in bankruptcy, district and appellate courts in Nevada and Georgia. Any justification for such

litigation ceased on August 18, 1981, when the WFDR stock (and, of necessity, any privileges afforded by the broadcasting licenses issued by the FCC) was sold pursuant to an amended plan of reorganization, as to which the Plaintiffs failed to pursue any objection. The Bankruptcy Court entered a final decree closing the WFDR estate on November 15, 1984, from which no appeal was taken. More recently, the present issues were litigated in an adversary proceeding against the Defendants, which the Plaintiffs ultimately appealed to the Eleventh Circuit. The appellate panel held on May 26, 1988, that the appeal was "frivolous." In the present action, the Plaintiffs continue to litigate matters that have been fully and finally resolved against them.

On the basis of the foregoing the Court finds that Defendants are entitled to a judgment on the pleadings as to some matters raised in the Complaint. Fed. R. Civ. P. 12(c). As to all matters raised in the Complaint and the Counterclaim, they are entitled to a summary judgment, in that there is no genuine issues as to any material fact, and the Defendants are entitled to judgment as a matter of law. Fed. R. Civ. P. 56; see Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986; Matsushita Electric Industries Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

The Eleventh Circuit's order of May 26, 1988, briefly disposes of the Plaintiffs' claim to any rights in or related to the WFDR stock and licenses by observing that the matter "was resolved long ago in the reorganization proceedings of WFDR." In so holding, the Eleventh Circuit applied a rule of res judicata that has long been recognized by that court, by the Ninth Circuit, and by the Supreme Court of the United States

The principle of res judicata as applied to bankruptcy proceedings is found in section 1141a) of the

Bankruptcy Code. That section states that a confirmed plan of reorganization, such as the Amended Plan in the WFDR case, has a binding res judicata effect on all parties:

> [T]he provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.

11 U.S.C. § 1141(a). All issues raised and all issues that could have been raised in objection to the confirmation of the Amended Plan are res judicata and cannot be raised in other actions seeking remedies for matters covered by the Amended Plan. See Southmark Properties v. Charles House Corp., 742 F.2d 862 (5th Cir. 1984); see also 5 Collier on Bankruptcy ¶ 1141.01[1] (15th ed. 1988). Res judicata not only bars claims that actually were litigated in a previous proceedings, but reaches beyond the scope of collateral estoppel and bars litigation of claims that could have been litigated in the previous action. Hotel Corp. of the South v. Rampart 920, Inc., 46 Bankr, 758, 767 (E.D. La), aff'd. 781 F.2d 901 (5th Cir. 1985).

The Ninth Circuit frequently has held that attempts to relitigate matters resolved in bankruptcy proceedings are impermissible, because barred by res judicata. Charlton v. Estate of Charlton, 841 F.2d 988 (9th Cir. 1988);
In re Dominelli, 820 F.2d 313 (9th Cir. 1987); In re Peoro, 793 F.2d 1048 (9th Cir. 1986) (collateral challenge to

bankruptcy plan barred by "[b]asic principles of res judicata"); see also Smith v. Industrial Accident Commission, 366 F.2d 479 (9th Cir. 1966) (claims barred against participants in adjudicatory process), cert. denied, 386 U.S. 915 (1967). The Plaintiffs have litigated for more than eight years against various parties, including the Defendants, over the WFDR stock and licenses, in four bankruptcy and adversary cases. Their claims have been determined to be "frivolous" by the Eleventh Circuit. They are now before this Court in a fifth case, attempting to litigate matters that have long since been resolved.

The United States Supreme Court in Stoll v. Gottlieb held that even a plan of reorganization erroneously discharging certain personal guaranties was nevertheless res judicata, and stated:

> Courts to determine the rights of parties are an integral part of our system of government. It is just as important that there should be a place to end as that there should be a place to begin litigation. After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined. There is no reason to believe that the second decision will be more satisfactory than the first.

305 U.S. 165, 172 (1938). Thus even had error been committed in the WFDR case, such error would not be open to continued relitigation by the present Plaintiffs, outside the bankruptcy case.

Additionally, the Court finds that neither Defendants Margaret H. Murphy nor Smith, Gambrell

and Russell has been properly served by Plaintiffs with process. The Plaintiffs apparently have attempted to serve process upon these Defendants using the "Form 18-A" procedure provided in Rule 4(c)(2)(C)(ii) of the Federal Rules of Civil Procedure. This attempt was insufficient for two reasons.

First, Defendant Margaret Murphy has not been served with process in this action, and is not, and was not a member or otherwise associated with the law firm of Smith, Gambrell and Russell, at the time the summons and complaint were purportedly served. Mailing a copy to the Defendant law firm therefore, cannot be proper service on Defendant Margaret Murphy under any circumstances.

Second, service on Defendant Smith, Gambrell and Russell was insufficient because the Plaintiffs used certified mail, and did not send a copy of the Form 18-A acknowledgement of a service, or a stamped envelope, with the summons and complaint, in violation of Rule 4(c)(2)(C)(ii). Additionally, the service does not satisfy subparagraphs (C)(I) because neither Nevada nor Georgia law provides for service by certified mail.

Therefore, under Rule 12(b)(5) of the Federal Rules of Civil Procedure, Plaintiffs' Complaint must be dismissed as to Defendants Margaret Murphy and Smith, Gambrell and Russell for insufficient service of process.

IT IS THEREFORE ORDERED that the Motions of Defendant/Counterclaimants Margaret H. Murphy and Smith, Gambrell and Russell for Judicial Notice, Judgment on the Pleadings and Summary Judgment (#28 and #29) are granted.

IT IS FURTHER ORDERED that the Motions of Defendant Margaret H. Murphy, and Smith, Gambrell and Russell for Dismissal Under Rule 12(b)(5) of the

Federal Rules of Civil Procedure for Insufficient Service of Process (#28 and #29) are also granted.

IT IS FURTHER ORDERED that the Motions of Defendants Margaret H. Murphy and Smith, Gambrell & Russell, for Preliminary and Permanent Injunctive Relief (#28 and #29) are denied.

DATED: April 24, 1989

Philip M. Pro
United States District Judge

APPENDIX 3

United States District Court
District of Nevada Order
Entered June 6, 1989

Order follows inconsistency of the
district court proceeding

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Case No. CV-S-88-541-PMP (RJJ)

ORDER

June 6, 1989

On April 6, 1989, Defendant/Counterclaimant Robert M. Garstin filed a Motion for Judgment on the Pleadings or Summary Judgment, and for Preliminary and Permanent Injunctive Relief or, in the Alternative for Transfer (#55).

On April 21, 1989, Plaintiff/ Debtors-in-Possession Jack R. Whitehorn and Mary Ruth Whitehorn filed a Response in opposition to Defendant/Counterclaimant Garstin's Motion (#56). Said Motion was referred to the undersigned for consideration on May 24, 1989.

A review of the Motion before the Court shows that it presents issues substantially identical to those raised in Motions for Judicial Notice, for Judgment on the Pleadings or Summary Judgment, and for Preliminary and Permanent Injunctive Relief or, in the Alternative, to Dismiss or for Transfer, previously filed on behalf of Defendant/Counterclaimants Margaret H. Murphy and Smith, Gambrel [sic] and Russell, which Motions were the subject of an Order of this Court entered April 26, 1989 (#58).

By the instant Motion, Defendant/ Counterclaimant Robert M. Garstin seeks judgment on the pleadings, or in the alternative, summary judgment, as to all claims raised in Plaintiffs' Complaint, and as to all claims raised by Defendant Garstin's Counterclaim,

pursuant to Rules 12(c) and 56 of the Federal Rules of Civil Procedure. Additionally, Defendant/Counterclaimant Garstin seeks an injunction prohibiting Plaintiffs Jack R. and Mary R. Whitehorn from pursuing further litigation relating to WFDR, Inc., against Defendant Garstin, pursuant to 28 U.S.C. §1651(a) and Rule 65 of the Federal Rules of Civil Procedure, and for leave to file a motion for attorneys fees and expenses of litigation pursuant to Rule 11 of the Federal Rules of Civil Procedure. Alternatively, Defendant/ Counterclaimant Garstin seeks an Order of this Court transferring the action to the United States District Court for the Northern District of Georgia pursuant to 28 U.S.C. §1404(a).

The pertinent facts relating to this action are set forth in the Court's Order entered April 26, 1989 (#58), and are incorporated herein. For the reasons set forth in that Order, the Court finds that Defendant/Counterclaimant Robert M. Garstin's Motion for Judgment on the Pleadings or Summary Judgment should be granted.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that Defendant/Counterclaimant Garstin's Motions for Preliminary and Permanent Injunctive Relief or, in the Alternative for Transfer are denied.

IT IS FURTHER ORDERED that Defendant/Counterclaimant Garstin's Motion for Leave to File a Motion for Attorneys Fees and Expenses of Litigation

Pursuant to Rule 11 of the Federal Rules of Civil Procedure is denied

DATED: June 5, 1989

Philip M. Pro
United States District Judge

APPENDIX 4

United States District Court
District of Nevada

Complaint -- Jury Demand

Filed July 1, 1988

Preceding orders do not resemble
relief requested

Summary Judgment/Judgment on the Pleadings not
available by
doctrine of *res judicata*

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Case No. CV-S-88-541-PMP (RJJ)

COMPLAINT
"JURY DEMAND"

Filed July 1, 1988

TO THE HONORABLE JUDGE OF SAID COURT:

Jack R. Whitehorn and Mary Ruth Whitehorn, Debtors-in-Possession, complain of Margaret H. Murphy, Law Firm: Smith, Gambrell and Russell, Robert M. Garstin and William T. Burke and respectfully show the court the following:

I.
PARTIES

1. Jack R. Whitehorn and Mary Ruth Whitehorn are individuals/Debtors-in-Possession residing in Las Vegas, Nevada.

2. Defendants, Margaret H. Murphy and Law firm: Smith, Gambrell and Russell, may be served with process by delivering same to First Atlanta Tower, 2 Peachtree Street, N.W., Suite 2400, Atlanta, Georgia 30383-2501.

3. Defendant Robert M. Garstin may be served with process by delivering same to 7500 Roswell Road, N.W., Atlanta, Georgia 30305.

4. Defendant William T. Burke may be served with process by delivering same to 5956 Sherry Lane, Dallas, Texas 75225.

II.
JURISDICTION AND VENUE

5. Jurisdiction of this court is invoked pursuant to 28 U.S.C., Section 1332, the parties being of diverse citizenship and the amount in controversy, exclusive of interest and costs, being in excess of Ten Thousand Dollars ($10,000.00).

Further jurisdiction of this court is invoked pursuant to 28 U.S.C. 1334(a)(d), a non-core cause of action.

Appropriate venue lies in 28 U.S.C. 1409(a).

6. The claims made in this complaint were discovered while researching, deposing certain Defendants and briefing adversary proceeding 86-0045, said proceeding being transferred by the Honorable United States Bankruptcy Court, District of Nevada to the United States Bankruptcy Court, Northern District of Georgia, Newnan Division and becoming adversary proceeding No. 87-0002N, then appealed to the United States District Court for the Northern District of Georgia, Newnan Division and becoming civil action C-87-103-N. The proceeding is now at the judicial level of the United States Court of Appeals for the Eleventh Circuit for a "Suggestion of Rehearing in Banc." No allegations made in this complaint should be construed as modifying or in any way changing the allegations made in the said adversary hearing and all allegations should be considered as alternative pleadings in the said causes of action.

III.
CLAIMS FOR RELIEF

A. Count One: Constructive Fraud

7. On December 8, 1980, an adversary proceeding being No. 800197 in case No. BK-LV-80-936 was filed in the United States Bankruptcy Court, District of Nevada. The proceeding was subsequently transferred to the United States Bankruptcy Court for the Northern District of Georgia, Newnan Division. The complaint sought inter alia return to Debtors' estate 100 percent of the outstanding stock of WFDR, Inc. After trial, an order by the United States Bankruptcy Court for the Northern District of Georgia, Newnan Division was entered on August 18, 1982, finding, "that the transfer is a voidable preference, and the court will not address whether the transfer was a fraudulent transfer." Said order was appealed by the Defendant to the United States District Court for the Northern District of Georgia, Newnan Division. The said court vacated the action and remanded same back to the bankruptcy court.

On January 26, 1984, an order by the United States Bankruptcy Court for the Northern District of Georgia, Newnan Division was entered which set out:

> "At this time the court notes that a preference action successfully brought by Mr. Jack Whitehorn against Dr. John Whitehorn regarding the pre-petition transfer of stock has been remanded to this court for additional findings of fact. However, that preference action has become moot under the terms of the settlement by which Dr. John Whitehorn disavows any interest in the equity of the Debtor."

The WFDR, Inc. stock is property of Debtors' estate. (An adversary proceeding, "Complaint to Compel Turnover of Property," is in progress at this time as herein above set out.)

If Plaintiffs fail in said turnover proceeding (of the actual stock certificate), there is no dispute that the Plaintiff/Debtors-in-Possession' estate has all the rights that free and clear titled ownership of the stock gives said estate pursuant to court order.

8. The Defendants, by fraud, interfered with the Plaintiffs/Debtors-in-Possession's estate rights, a consequential value to said estate, and of an economic benefit gained through said adversary proceeding by having the Federal Communications Commission license transferred by fraudulent means. The said licenses are not and were not the property of the corporate estate. This estate can use, sell or lease said right for the benefit of estate rehabilitation. The said rights were, and are protected by the United States Bankruptcy Court, District of Nevada through the automatic stay, Title 11, U.S.C. 11 §362(a)(1)(3) as of October 6, 1980.

B. Count Two: Fraudulent Conveyance Sounding in Constitutional Tort

9. Plaintiffs incorporate the preceding paragraphs as if fully set forth herein.

10. The captioned Defendants did, in fact, knowingly, willfully and wantonly have transferred, without any judicial power, the Plaintiffs/Debtors-in-Possession's estate rights, the Federal Communications Commission licenses of WFDR-AM and WFDR-FM, and have defrauded the estate's creditors by hinder and delay; and not allowing Plaintiffs/Debtors-in-Possession due

process to reorganize their estate pursuant to Title 11, United States Bankruptcy Code.

C. Count Three: Fraudulent Intent Sounding in Tort

11. Plaintiffs incorporate the preceding paragraphs as if fully set forth herein.

12. The Defendants did, in fact conceal, knowingly and fraudulently from the United States Bankruptcy Court, District of Nevada, facts pertaining to the Debtors' estate property rights. Said Defendants did, in fact, knowingly and fraudulently, make false declarations, certificate, verification and/or statements to the Federal Communications Commission and/or others under penalty of perjury as permitted under the United States Code, in or in relation to this Debtors case under Title 11.

D. Count Four: Civil Conspiracy Sounding in Tort

13. Plaintiffs incorporate the preceding paragraphs as if fully set forth herein.

14. Defendants did, in fact, conspire to defraud Debtors' estate by their actions and writings before the Federal Communications Commission of the United States of America and/or others. Wherein Defendants did, in fact, knowingly and willfully falsify, conceal, cover up by trick, scheme, device [sic] a material fact, make false fictitious and fraudulent statements and representations, use false writing and documents, knowing the same to contain false, fictitious and fraudulent statements resulting in injury to the property rights of Debtors' estate.

E. Count Five: Mail Fraud Sounding in Tort

15. Plaintiffs incorporate the preceding paragraphs as if fully set forth herein.

16. The Defendants did in fact use the United States mail to defraud the Debtors' estate of property rights by mailing certain documents to the Federal Communications Commission of the United States of America and/or others, said documents containing false and fraudulent information, having devised a scheme to defraud Debtors' estate of the property rights held by the estate through judicial order.

F. Count Six: Wire Fraud Sounding in Tort

17. Plaintiffs incorporate the preceding paragraphs as if fully set forth herein.

18. Defendants did, in fact, use wire (land line telephone) to devise the scheme and to carry out the scheme to defraud Debtors' estate of the property rights as set out herein above. Said scheme allowed Defendants to obtain money by means of false or fraudulent pretenses, representations and/or promises.

G. Count Seven: Racketeering Activity Sounding in Tort

19. Plaintiffs incorporate the preceding paragraphs as if fully set forth herein.

20 Defendants have, in fact, committed acts of racketeering activity including, but not limited to, mail fraud, wire fraud, obstruction of justice, fraud in

connection with Debtors case under Title 11, United States Code.

IV.
DAMAGES

21. Defendants as fiduciaries had a duty to deal honestly, openly and fairly with the United States Bankruptcy Court, District of Nevada, the public and Plaintiffs/Debtors-in-Possession's estate and failed to discharge said duties pursuant to law.

22. Defendants had a duty not to interfere with orderly reorganization of Debtors' estate or with the property rights of Debtors' estate pursuant to Title 11, United States Code §362 (a)(1)(3).

23. The Rights to the WFDR-AM and WFDR-FM Federal Communications Commission licenses did not become the property or an asset of the WFDR, Inc. Chapter 11 proceeding.

24. Defendants, by their actions and factual circumstances as set out herein, are guilty of wanton, willful, knowing and grossly negligent interference in a lawful economic benefit acquired by the Debtors' estate and protected by the United States Bankruptcy Court, District of Nevada pursuant to the United States Congress mandate of the automatic stay effective on the date of Debtors' petition and relief granted October 6, 1980.

25. Defendants' intentional acts were aggravating in nature and wounded the feelings of Debtors.

26. Defendants, first, are in a position to repeat the offense set out in this complaint as to others, and should be economically penalized to deter and discourse

Defendants from any repetition of such fraudulent conduct.

27. Because the representations and acts of the Defendants were made willfully and with full knowledge on Defendants' part that they were false, the Plaintiffs seek exemplary damages in the amount set out below.

28. As a result of the Defendants' acts outlined herein, the Plaintiffs/Debtors-in-Possession have suffered the following damages:

(1) The lost value of the Federal Communications Commission grant of licenses to operate, sell, use or lease for the benefit of the Plaintiffs/Debtors' creditors and estate in the amount of Two Million Five Hundred Thousand Dollars ($2,500,000.00);

(2) Expenses incurred in litigation to recover all property rights acquired by the estate in the amount of One Hundred Fifty Thousand Dollars ($150,000.00);

(3) Punitive damages in an amount not greater than Fifteen Million Dollars ($15,000,000.00);

(4) Interest;

(5) Cost of court;

(6) Reasonable attorneys' fees; and

(7) Such other and further relief, both general and special, at law and equity to which

Plaintiffs/Debtors-in-Possession may show themselves justly entitled.

Respectfully submitted,
Jack R. Whitehorn
Debtor-in-Possession/Plaintiff
Mary Ruth Whitehorn
Debtor-in-Possession/Plaintiff

JURY DEMAND

Please take notice that Plaintiffs/Debtors-in-Possession, Jack R. Whitehorn and Mary Ruth Whitehorn, demand a trial by jury as to all counts of this action.

APPENDIX 5

United States Bankruptcy Court
Northern District of Georgia
Newnan Division Order

Entered July 31, 1987

Final Order Entered in WFDR, Inc. Case

Petitioner Jack Whitehorn retains all
rights in ownership and rights
not effected by certificates
of interest issued

No jurisdiction off FCC matters
as self-evident

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

In Chapter 11 Proceedings for the
District of Nevada
Case Number BK-LV-80-00936

Adversary Number 87-0002N
(Nevada Adversary No. 86-0045)

ORDER

Ordered July 31, 1987

This adversary proceeding is before the Court on cross-motions for summary judgment. Plaintiffs, Jack R. Whitehorn and Mary Ruth Whitehorn ("Whitehorn"), initiated this proceeding by filing a "Complaint to Compel Turnover" on April 3, 1986, in the United States Bankruptcy Court for the District of Nevada, where the plaintiffs' Chapter 11 case is pending. On December 17, 1986, that Court entered an Order which granted the defendants' motion to transfer the adversary proceeding, but not the Chapter 11 case, to this district.

The complaint filed by Whitehorn seeks the turnover under 11 U.S.C. §542 of one hundred percent (100%) of the stock of WFDR, Inc., which is in the form of Certificate No. 1 for 50 shares and Certificate No. 2 for 5,000 shares, as well as "all assets said stock owns." WFDR, Inc. ("WFDR") was the owner of WFDR-AM and WFDR-FM radio stations in Manchester, Georgia, and a debtor in this district as a result of the filing of a petition under Chapter 11 on May 9, 1980 (Case No. 80-00136N). Defendant, Margaret H. Murphy, and the law firm of Smith, Cohen, Ringel, Kohler & Martin acted as attorneys for the corporate debtor-in-possession, WFDR,

and as Estate Administrators in WFDR's Chapter 11 case. Smith, Cohen, Ringel, Kohler & Martin is the predecessor law firm to defendant, Smith, Gambrell & Russell.

The defendants seek summary judgment on the grounds that the plaintiffs' claims are barred by the doctrine of res judicata as a result of orders entered in the Chapter 11 case of WFDR. Plaintiffs' motion for summary judgment asserts that this Court had no authority to dispose of the stock belonging to Plaintiff Jack R. Whitehorn unless the stay was lifted in Plaintiffs' individual Chapter 11 proceeding, which has been pending in the United States Bankruptcy Court for the District of Nevada since October 6, 1980. The material facts of this case as to which there is no genuine dispute are as follows.

Jack Whitehorn was the original sole shareholder of WFDR. On March 28, 1980, Jack Whitehorn executed a Stock Option Agreement which contained a proxy giving voting authority over the stock together with an option to acquire all of the outstanding stock to his brother, Dr. John Whitehorn. On May 9, 1980, WFDR, under management elected through an exercise of the proxy, filed its Chapter 11 petition which commenced its bankruptcy case in this Court. Jack Whitehorn and Mary Ruth Whitehorn filed their own individual Chapter 11 case in Nevada on October 6, 1980.

On November 5, 1980, in Nevada and on July 22, 1980, in this district, Whitehorn initiated adversary proceedings against Dr. John Whitehorn, which proceedings contested ownership of the stock and control of the corporation.

On January 30, 1981, the Nevada court transferred the Nevada adversary proceeding to this district.

Also on January 30, 1981, WFDR, as debtor-in-possession, filed an application to sell its assets. Whitehorn objected to the application both as a creditor of WFDR and as a claimant that he was the sole and rightful owner of all of the shares of WFDR. Following a hearing, this Court entered an Order, on March 16, 1981, approving the sale of assets for $790,000.00 to Lake George Corporation, predecessor in interest to Provident Broadcasting Company ("Provident"). On April 8, 1981, this Court denied Whitehorn's motion for a new trial, for alteration or amendment of judgment, or for additional findings of fact. Whitehorn timely noticed an appeal from the Orders of March 16 and April 6, 1981 (hereinafter "Orders approving the sale of assets") but did not seek a stay of the sale.

Before the appeal was heard by the United States District Court for the Northern District of Georgia, WFDR filed, on May 27, 1981, an "Amended Plan of Reorganization" which proposed in Articles IV and V to implement the Orders approving the sale of assets by structuring the transaction in such a way that the outstanding stock of WFDR would be cancelled with prior holders of such stock receiving certificates of interest in the proceeds of the sale of newly issued stock to Provident.

Whitehorn filed objections to the disclosure statement and to confirmation of the amended plan on grounds, inter alia, that the management of WFDR which had authorized the filing of the Chapter 11 petition had no power to do so. On June 29, 1981, this Court entered an Order confirming the amended plan. In the confirmation order, the Court acknowledged that there was a pending adversary proceeding between Jack and John Whitehorn regarding the equity ownership of WFDR but stated that even if "Jack Whitehorn is proven

to be the owner of all the stock of WFDR, Inc., despite his objection to the plan of reorganization the plan should be confirmed pursuant to 11 U.S.C. §1129 (b)(2)(C)." There was no appeal filed from the Order confirming the plan.

Following approval by the Federal Communications Commission of the transfer of control of WFDR and the filing of an application by the defendants which sought approval of the date of August 18, 1981 as the effective date of the plan, the Court entered an Order setting such date and stating that the defendants would act as Estate Administrator for the plan. The transaction with Provident in accordance with the plan was closed on August 16, 1981.

In an order dated September 18, 1981, the United States District Court for the Northern District of Georgia dismissed Whitehorn's appeal of the Orders approving the sale of assets as moot "in that the amended plan providing for the sale of the stock in lieu of a sale of the assets has been approved and consummated." The District Court also noted that the order approving the sale of stock had not been appealed from and that no stay of said sale had been obtained. On appeal, the United States Court of Appeals for the Eleventh Circuit affirmed the District Court's Order dismissing Whitehorn's appeal as moot, because the order confirming the plan was not appealed and the sale authorized by the plan was not stayed.

On August 18, 1982, this Court entered an Order in an adversary proceeding between Jack Whitehorn and Dr. John Whitehorn which held that the execution by Jack Whitehorn of the stock option agreement to John Whitehorn was a preferential transfer and therefore

voidable[1] under 11 U.S.C. §547. On appeal, the District Court, on May 27, 1983, vacated the Order finding the stock option to be a preference and remanded the proceeding to this Court for further findings.

On July 14, 1983, the defendants, as Estate Administrator, and the Creditors' Committee of WFDR filed a joint application to settle claims which provided, inter alia, that upon partial payment of certain administrative and unsecured claims of Dr. John Whitehorn, Dr. John Whitehorn would relinquish his claim to ownership of the shares in WFDR, which would then be deemed to be held free and clear by Jack Whitehorn. The application further proposed that pursuant to Jack Whitehorn's ownership interest, which would then be undisputed, payment of $35,000.00 would be made from the remaining funds held by the Estate Administrator to Jack Whitehorn's attorneys. On January 26, 1984, this Court entered two Orders approving the proposed settlement, which Orders included statements approving the payment to Jack Whitehorn's attorneys in recognition of his equity interest. Such a payment to Jack Whitehorn's attorneys from the WFDR proceeding for

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[1] To any extent that Jack Whitehorn is now asserting that the Order finding a preferential transfer shows that WFDR had no right to file its Chapter 11 case without his authorization, this assertion would be beyond the holding of that Order. Finding the stock option agreement to be a preference does not mean that the Court found the agreement was void from its inception, or that the transfer, in effect, never took place. Rather, the Order finding a preference holds that the transfer of stock ownership which did occur is voidable and could therefore be reversed by Jack Whitehorn. This Court has never found the transfer to be void and has, in fact, in the March 16, 1981 Order approving the sale of assets, explicitly rejected Whitehorn's assertion that the management elected through the exercise of the proxy contained in the stock option agreement lacked the authority to commence WFDR's Chapter 11 case.

the benefit of Jack Whitehorn's individual estate had been specifically authorized by Order dated May 6, 1983, entered in the District of Nevada where Whitehorn's personal bankruptcy case is pending. The $35,000.00 payment to Whitehorn's attorneys was in fact made following the filing of an application to pay administrative expenses, and, on November 15, 1984, a final decree was entered which closed the estate of WFDR.

It is clear that the claims raised by Whitehorn in the adversary proceeding at bar have been previously addressed by this Court in the WFDR case. The Bankruptcy Code provides:

> [T]he provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder or general partner in the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder or general partner has accepted the plan.

11 U.S.C. §1141(a). Under this provision, questions which could have been raised pertaining to a confirmed plan are res judicata. See 5 Collier on Bankruptcy ¶1141.01[1] (15th ed. 1987). For a prior judgment to bar a subsequent action under the doctrine of res judicata, the parties must be the same in both suits, the prior judgment must have been entered by a court of competent jurisdiction, there must have been a final judgment on the merits, and the same cause of action must be involved in both cases. See., e.g., Southmark Properties v. Charles House Corporation, 742 F.2d 862, 869 (5th Cir. 1984).

Here, Jack Whitehorn, as a creditor and disputed shareholder of WFDR and by his active participation in WFDR's reorganization, was clearly a part-in-interest to the orders entered in WFDR's Chapter 11 case. The Orders approving the sale of assets, which Orders were appealed, and the confirmation order, which was not appealed, constitute final judgments on the claims raised by Whitehorn in the WFDR reorganization and, if the claims now raised by Whitehorn are the same and if this Court had jurisdiction to enter those orders, then Whitehorn is precluded from raising the same claims again.

Whitehorn's complaint seeks a turnover of the WFDR stock certificates and "all assets said stock owns." In the Orders approving the sale of assets, this Court approved the sale of the assets of WFDR free and clear of all claims and interests and also authorized WFDR and the purchaser to restructure the transaction as a stock acquisition or merger. Such a restructuring of the deal was proposed by the amended plan which was confirmed on June 29,1981, and which provided for cancellation of existing stock while new stock was issued to Provident, as purchaser. Whitehorn's claims challenging the sale of assets or the cancellation of his stock (including his claim that reissuance of stock pursuant to the plan violated securities laws are therefore barred by res judicata if this Court had jurisdiction to enter those orders.

This appears to be the key to Whitehorn's argument in this proceeding: that this Court had no power to enter orders affecting Jack Whitehorn's property because his property was under the exclusive jurisdiction of the United States Bankruptcy Court for the District of Nevada and was protected by the automatic stay pursuant to 11 U.S.C. §362 when he filed his own Chapter 11 case in that district. Assuming that WFDR properly had its

bankruptcy case before this Court[2] and even if it was undisputed from the beginning that Jack Whitehorn was the sole shareholder of WFDR, this Court entered no Orders and the defendants took no action which would required that the stay be lifted in Whitehorn's individual case in Nevada.

As a shareholder, Jack Whitehorn had certain rights in the corporation's bankruptcy case, including the right to receive a distribution of the residual value of the corporation after all claims against the company were satisfied. The cancellation of the existing WFDR stock did not affect such right because Jack Whitehorn received in its place certificates of interest in the proceeds of the sale of WFDR, and a distribution of such proceeds was in fact made on Jack Whitehorn's behalf to his attorneys. It is true, as Whitehorn argues, that the question of ownership of stock was ultimately decided in Jack Whitehorn's favor. Jack Whitehorn benefited from his ownership interest when his attorneys were paid from the proceeds of the sale of the newly issued stock of WFDR. His ownership entitled him to such a distribution, but his own bankruptcy filing did not give him any greater rights to challenge the sale than he already possessed as a party-in-interest in WFDR's case. It thus appears that the orders in the WFDR case did not affect Jack Whitehorn's property rights but only affected the pieces of paper representing such rights -- i.e. the stock certificates which were cancelled and replaced by certificates of interest in the sale proceeds.

Whitehorn's own bankruptcy could not stay the ministerial act of cancellation of shares by the corporate

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[2] Any claim to the contrary would be barred by res judicata since this Court rejected Whitehorn's claim that the management which authorized the filing of the petition lacked the power to do so.

debtor-in-possession any more than any individual shareholders' bankruptcy could stay the fluctuation of the market price of such individual's shares. Although the automatic stay protects a debtor from certain acts against his property, it does not enhance his rights held pursuant to contracts, leases, or stock certificates. In short, this Court had jurisdiction as a result of WFDR's filing to issue Orders approving the sale of assets or the cancellation of stock even if an individual stockholder's own bankruptcy case was pending in another jurisdiction.[3] Therefore, Whitehorn's claims are barred as res judicata.

Furthermore, following the approved sale of assets or cancellation of stock, the actual WFDR certificates were of inconsequential value and are therefore not subject to turnover under 11 U.S.C. §542.

Finally, the Court notes that the defendants have filed a motion to amend their answer to assert the affirmative defense of the statute of limitations to the extent that the complaint seeks to avoid a post-petition transfer pursuant to 11 U.S.C. §549. The plaintiffs have responded that they do not oppose the amendment but deny that the statute of limitation is applicable because their complaint does not raise §549. The Court will therefore grant the motion to amend, but holds, as a further ground for granting defendants' summary judgment motion, that the clear language of 11 U.S.C. §549(d)(1) would bar Whitehorn's transfer, because the action was not commenced within two years of the transaction sought to be avoided.

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[3] Statutory authority for this conclusion can be found at 11 U.S.C. §1141(d)(1)(B) which provides that a confirmed plan terminates all rights and interests of equity security holders provided for by the plan, unless the plan states otherwise.

Accordingly, it is ORDERED:

(1) that the defendants' motion for leave to amend answer is granted:

(2) that the plaintiffs' motion for summary judgment is DENIED; and

(3) that the defendants' motion for summary judgment is GRANTED, and this proceeding is therefore DISMISSED.

At Newnan, Georgia, this 31 day of July, 1987.

W. H. DRAKE, JR.
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

In Chapter 11 Proceedings for the
District of Nevada
Case Number BK-LV-80-00936

Adversary Number 87-0002N
(Nevada Adversary No. 86-0045)

JUDGMENT

Judgment is hereby entered for the defendants in the above-styled adversary proceeding in accordance with the Order of the Court entered the 31 day of July, 1987.

At Newnan, Georgia, this 31 day of July, 1987

W. H. Drake, Jr.
United States Bankruptcy Judge

APPENDIX 6

United States Bankruptcy Court
Northern District of Georgia
Newnan Division Order

Filed March 16, 1981

Said court is most explicit in
determining that it does not
have jurisdiction of FCC matters

Order clearly shows petitioners raised the issues in said
complaint

Res judicata precluded

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

Case Number 80-00136N .

In Proceedings under Chapter 11
of the Bankruptcy Code

ORDER

Filed March 16, 1981

On January 30, 1981, the above-referenced debtor filed an application to sell real and personal property in accordance with one of two offers, depending upon which offer was found to be in the best interest of the estate by the Court. One offer submitted by Arthur Angell was for a cash purchase price of $500,000.00. The second offer was submitted by Brunson Communications, Inc. for a purchase price of $525,000.00 cash. On February 11, 1981, Jack Whitehorn, as a creditor of WFDR, Inc. and as a claimant that he is the sole and rightful owner of all the shares of stock of the debtor in possession, filed an objection to this application to sell. A hearing to determine whether or not to approve the sale of assets was held, and at that hearing an offer of $790,000.00 was submitted. That offer is currently the highest and best offer before the Court. At the time of that hearing, Jack Whitehorn reaffirmed his objection, additional hearings were held on his objection, and the matter was taken under advisement.

The objection of Jack Whitehorn is based on several grounds. The first ground for objection is that the proposed sale and the method under which it is proposed to be accomplished are not appropriate and proper for a debtor in possession in the Bankruptcy Court. The

second objection is based on the allegation that the sale is for a totally inadequate and insufficient value. The third ground for objection is that the proposed sale eliminates any equity in the corporation, thus working an extraordinary inequity on the shareholders. The objection is also based upon mismanagement by the present management and the argument that the purported present management lacks authority to act on behalf of the corporation. The final ground for objection is that the proposed sale violates the rules and regulations of the Federal Communications Commission.

The evidence introduced by the parties at these hearings indicates to the Court that the objection of Jack Whitehorn should be overruled and the offer of $790,000.00 submitted by the Lake George Corporation should be accepted.

The first objection raised by Jack Whitehorn to the sale is based on the ground that the proposed sale and the method of sale are inappropriate for a debtor in possession. The Court finds this not to be the case. First, there is no prohibition against a liquidating Chapter 11 reorganization. 11 U.S.C. §1123(b)(4). Moreover, there is clear authority allowing the sale of property of the estate other than in the ordinary course of business. 11 U.S.C. §363(b).

Second, the debtor in possession in this case solicited offers for the sale of the assets of the debtor in possession by word of mouth. The evidence indicates that in the radio industry there appears to be some conflict concerning the best way to market a radio station. One group of witnesses indicated that a radio station should be marked with some type of advertising campaign through a broker. The other viewpoint, propounded by the witnesses for the debtor in possession, holds that the members of the radio industry compose a very closely-

knit grade group and that word-of-mouth marketing constitutes an appropriate means whereby to sell this radio station. The debtor in possession opted for the latter method of soliciting bids for this radio station.

A point was made that it is better for advertising sales if this station does not publicize the fact that it is for sale. However, it was also noted that this would not hold true for a radio station which was in a Chapter 11 proceeding because the customer and advertisers of the radio station would already have some idea that the station was not on the firmest financial footing. While this would indicate that it might be more appropriate to market a radio station which is in a Chapter 11 reorganization proceeding through a broker in order to obtain a wider potential market and a higher price, it is not conclusive. The Court finds the telling argument to be raised by the facts that the proceeding has been pending several weeks with the bid of Lake George Corporation before the Court, and yet no broker has brought forth a better bid during this time period. Therefore, the Court finds that both the proposed sale and the method used to achieve this proposed sale are appropriate for this Chapter 11 debtor.

The second argument of Jack Whitehorn in opposition to the confirmation of this sale is that the sale is for inadequate value. At the time that the objection was filed, the high bid for the assets of the debtor in possession was $525,000.00. The current high bid for the assets of the radio station is $790,000.00. It is obvious that the circumstances have diluted the import of Mr. Whitehorn's second argument. The evidence introduced at the hearing indicated that the value of this radio station is somewhere between $500,000.00 and $1.2 million, the first figure being the low bid submitted for consideration by this Court, and the second figure

representing an offer made by Mr. Reagan Henry prior to the filing of this Chapter 11 case.

While the $1.2 million figure appears to represent an amount at the high end of the range of value that a qualified purchaser might be willing to pay for the assets of the debtor, the transaction was not consummated for that amount. One of the reasons that the transaction was not consummated appears to be the difficulty, if not impossibility of penetrating the Atlanta sales market. The evidence before the Court indicates that if adequate funds were available to raise the height of the broadcasting tower, advertising might be sold in the southwest suburban fringe of Atlanta. However, because of FCC restrictions and the likelihood of diminishing returns upon the investment required to increase the tower height, the value of the assets of the debtor in possession is substantially limited by the inability of the station to broadcast a city grade signal into the city of Atlanta. In light of this finding, it appears clear to the Court that is [sic] is unlikely that any type of marketing effort could produce and consummate a sale at a price in the high range of the value for this station. Therefore, the Court finds that the sales price of $790,000.00 offered by the Lake George Corporation is the best sales price which could be obtained for these assets and overrules the objection of Jack Whitehorn to the extent that it is based upon inadequacy of value.

Mr. Whitehorn's third objection was, at the time the objection was filed, that the sale eliminated any equity interest and, therefore, worked an undue hardship on the shareholders. While that objection may have had some merit had the sale been consummated for a price of $500,000.00, the current bid price is $790,000.00. Even after payment of all debts and administrative expenses, there would be a considerable amount of equity available

for shareholders. Therefore, this objection must also be overruled.

The fourth objection concerns mismanagement by the present management and the purported lack of authority of the current management to act on behalf of the corporation. Without either praising or disparaging the current management, the Court finds no mismanagement so flagrant as to create a bar to the proposed sale. The Court also finds that the current management has acted within its authority in commencing these proceedings and pursuing this sale. The current president and director of the corporation, Mr. Garstin, was elected by the exercise of a proxy valid on its face. Moreover, the corporate Minute Book indicates the authority of the current management of the debtor in possession to file this Chapter 11 case. Therefore, these objections must be overruled.

The final objection to the sale is based on the premise that the sale violates the rules and regulations of the FCC. While the decision as to whether or not the sale does violate the rules of that body is not for this Court, the Court notes that this sale is made subject to and contingent upon FCC approval of the transfer of the licenses for WFDR, Inc. to the Lake George Corporation. Both the debtor in possession and the prospective purchaser have indicated that neither of them is concerned about the possibility that the FCC will reject the Lake George Corporation as transferee for the licenses. The Court does not find this to be a substantial ground for an objection and therefore overrules this final objection.

The Court presently has exclusive jurisdiction over all property of WFDR, Inc., debtor in possession, and will retain jurisdiction to enforce the sale authorized by this Order, and to protect the transaction from interference or

attack in proceedings other than before this Court or on appeal from this Order. Therefore,

IT IS HEREBY ORDERED AND ADJUDGED that all parties before this Court and who have appeared in this proceeding are permanent restrained and enjoined from instituting any suit or proceeding before any court or administrative agency other than in this Court and in proceedings on appeal from this Order seeking to restrain or enjoin the closing of this sale authorized hereby, to set said sale aside, to recover any assets sold pursuant to this Order from the purchaser or the purchaser successors or assigns, or to in any way threaten, inhibit or restrict the purchaser's lawful use of the assets sold pursuant to this Order.

IT IS FURTHER ORDERED AND ADJUDGED that the Court shall retain jurisdiction to modify this Order, to restrict or expand its scope or coverage as the case may be, upon proper application, and to enforce this Order.

IT IS FURTHER ORDERED AND ADJUDGED that the debtor and the purchaser close the transaction within a reasonable time hereafter upon satisfaction of the condition that the Federal Communications Commission approve the transfer of control of the radio station to the purchaser, or a waiver of such condition by the purchaser; but the parties may, in the meantime, restructure the transaction as a stock acquisition or merger, as the debtor and the purchaser may deem to be desirable, but with the end result that the debtor in possession shall receive and hold for the benefit of creditors and shareholders the full purchase price.

IT IS FURTHER ORDERED AND ADJUDGED that the assets which are sold shall no

longer be subject to the claims of creditors and shareholders of WFDR, Inc.

IT IS SO ORDERED.

At Atlanta, Georgia, this 16 day of March, 1981.

W. H. DRAKE, JR.
UNITED STATES BANKRUPTCY JUDGE

APPENDIX 7

United States Court of Appeals
for the Ninth Circuit Order

Filed August 31, 1989

Petitioners' notice to lower courts
of Constitutional questions

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Case No. 89-15630

District Court Case No. CV-88-0541-PMP

ORDER

Filed August 31, 1989

It is hereby certified that appellants have provided this court with notification of a constiutional question pursuant to Fed. R. App. P. 44.

A copy of this order and appellants' filing shall be provided to the United States Attorney.

This order is subject to reconsideration by a judge if any objection is filed within ten (10) days of the entry of the order.

For the Court:

Cathy A. Catterson
Clerk of the Court

Cole Benson
Deputy Clerk

pro 8.28

APPENDIX 8

United States Bankruptcy Court
Northern District of Georgia
Newnan Division

Defendants Counterclaim
Filed August 18, 1980

Counterclaim, without exception
clearly shows Petitioner Jack Whitehorn
never executed any documents to
transfer record of ownership with FCC
(Case still pending)

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

In Chapter 11 Proceedings

Bankruptcy Number 80-00136N

Adversary Proceeding Number 80-0034N

Case Filed August 18, 1980

DEFENDANTS COUNTERCLAIM
AGAINST PLAINTIFF

COMES NOW the Defendant, Debtor-in-Possession, WFDR, INC. ("WFDR"), and as Plaintiff herein, states its Counterclaim as follows:

1.

Jack Whitehorn, Defendant herein, filed this Adversary Proceeding, and, therefore, is subject to the jurisdiction of this Court.

COUNT I

2.

Jack Whitehorn, Defendant herein, has, together with his wife, Mary Whitehorn, executed, on or about March 28, 1980, that certain "Stock Option Agreement," attached as Exhibit "A" to the original Complaint of Jack Whitehorn, to which this Counterclaim is made.

3.

WFDR, Inc., as Debtor-in-Possession, has been working diligently since May 9, 1980, the date on which

its Chapter 11 Petition was filed, to stabilize its relations with its creditor and to rehabilitate its overall operations.

4.

In its dealings with its creditors, employees, customers and others during the activities referenced in Paragraph 2 above, WFDR has learned that the Defendant herein has pursued a course calculated to interfere with the orderly business operations of WFDR.

5.

Specifically, the Defendant herein has:

(a) misrepresented to employees of WFDR that he owns and controls WFDR;

(b) misrepresented to certain creditors of WFDR that he owns and controls the stock;

(c) misrepresented to a creditor holding a pledge of the stock of WFDR that he owns the stock;

(d) misrepresented to certain customers of WFDR that he owns and controls WFDR;

(e) refused to execute and deliver various necessary forms to certain regulatory agencies, as required by them, and has misrepresented to certain agencies that he owns and controls WFDR.

6.

As a direct result of such willful and wrongful conduct, WFDR has been impeded in its efforts to make arrangements with its creditors for the orderly retirement of its debts.

7.

Unless the Defendant herein is immediately restrained from continuing such conduct, WFDR will suffer immediate and irreparable injury.

8.

The actions of Defendant herein have been willful, with the knowledge that these actions severely injured WFDR in the orderly conduct of its business.

WHEREFRORE, [sic] having stated Count I of its Counterclaim against the Defendant herein, WFDR, Inc., Debtor-in-Possession, prays and demands that Jack Whitehorn be temporarily, preliminarily and permanently enjoined from directly or indirectly, making conduct with any employees, customers and creditors of WFDR, regarding any matter that includes within its scope WFDR or its business affairs.

COUNT II

9.

Jack Whitehorn, Defendant herein, has, together with his wife, Mary Whitehorn, executed, on or about March 28, 1980, that certain "Stock Option Agreement," attached as Exhibit "A" to the original Complaint of Jack Whitehorn, to which this Counterclaim is made.

10.

Defendant, Jack Whitehorn, has attempted to vitiate said Stock Option Agreement, and has thereby refused to sign documents necessary to consummate the record transfer of the corporate stock and ownership and control of Plaintiff, WFDR, Inc., to Dr. John Whitehorn.

WHEREFORE, Plaintiff, WFDR, Inc., requests a declaratory judgment that title to said corporate stock is vested in Dr. John Whitehorn, that Defendant Jack Whitehorn has no ownership interest in said corporation, and that Defendant Jack Whitehorn be ordered to execute all documents necessary to consummate record transfer of ownership and control of Plaintiff, WFDR, Inc.

Respectfully submitted, this 18th day of August, 1980.

SMITH, COHEN, RINGEL, KOHLER & MARTIN

By: Margaret H. Murphy
and
By: Kenneth L. Millwood

2400 First National Bank Tower
Atlanta, Georgia 30383
404/656-1800

BURKE & JOHNSON

By: William T. Burke, Jr./by
MH Murphy

ATTORNEYS FOR WFDR, INC.

APPENDIX 9

Response to Petitioner Jack Whitehorn
from Federal Communications Commission
Dated August 14, 1981

Federal Communications Commission Letter
clearly, without any equivocation,
sets forth Petitioner Jack Whitehorn
has never had opportunity to
appear before said agency

Due process denied

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554
Aug 14 1981

In reply refer to
8430

Mr. Jack Whitehorn
2707 Colanthe Avenue
Las Vegas, Nevada 89102

Dear Mr. Whitehorn:

This is in reference to your letter dated May 27, 1981, your "Motion to Dismiss" filed with the Commission on July 30, 1981, and your "Supplementary Response" received on August 12, 1981, all of which request denial or deferral of action on the application for transfer of 100% control of WFDR, Inc., licensee of WFDR and WFDR-FM, Manchester, Georgia, from WFDR, Inc., Debtor-in-Possession, to Provident Broadcasting Company (BTC-810428HV and BTCH-810428HW).

On June 19, 1980, the Commission gave effect to an order of the United States Bankruptcy Court, Northern District of Georgia, Newnan Division, by granting an application requesting the approval of the assignment of the licenses for stations WFDR and WFDR-FM from WFDR, Inc., to WFDR, Inc., Debtor-in-Possession. On June 29, 1981, that same court entered an Order Confirming Plan wherein it approved the transaction proposed in the present application which would result in Provident Broadcasting Company being the 100% stockholder of WFDR, Inc.
Section 309 of the Communications Act of 1934, as amended, and Section 73.3584 of the Commission's rules, provide that petitions to deny must be filed within thirty days from the date an application is accepted for filing,

must be served on the applicant, must contain specific allegations of fact sufficient to show that grant of the application would not serve the public interest and be supported by affidavit of a person with personal knowledge of the facts alleged. Your submissions are procedurally defective as a petition to deny. Nevertheless, they have been considered as informal objections under Section 73.3587 of the Commission's rules.

You contend that WFDR, Inc., Debtor-in-Possession, "does not have legal title to the stations and that any transfer to Provident would be an unauthorized transfer of control." In this regard, you state that you have appealed the Bankruptcy Court's decision and that the appeal is currently pending. You request that the Commission "stay the transfer proceedings...until such time as all issues of ownership are resolved."

In your "Supplementary Response," you further allege that Provident has assumed control of the stations prematurely. You have submitted a letter from Jimmy D. NeSmith, President of First American Bank, wherein he states that a "Mr. Garstin, who claims to be manager and an officer of WFDR, Inc., came to my office with another gentleman and identified him as the new owner of WFDR," and that these individuals tried to sell him advertising. Robert M. Garstin and James M. Goodloe, the "other gentleman," have both responded to Mr. NeSmith's statements. They maintain, in affidavits, that at that time they were both associated with WFDR, Inc., Debtor-in-Possession, that Mr. Goodloe was not held out to be the new owner of the stations, and that they were offering to sell advertising in the name of WFDR, Inc., Debtor-in-Possession, and not Provident. Neither Mr. Garstin nor Mr. Goodloe are officers, directors or stockholders of the proposed assignee. Mr. Garstin was

to be the general manager of the stations but has now accepted another position elsewhere.

The Commission has stated that "at the very least, complaints to the Commission, regardless of label, should contain specific factual allegations which would warrant grant of the relief requested." Hanes Broadcasters, Inc., 52 FCC 2d 998, 1002 (1975), quoting from Midland Broadcasters, Inc. 48 FCC 2d 195, 196 (1974). In order to justify deferral of an application or its designation for hearing, an objection must present "a substantial and material question of fact" as to whether a grant of the application would serve the public interest, convenience and necessity. 47 U.S.C. §309(e). Your allegations based on Mr. NeSmith's perception of his meeting with Messrs. Garstin and Goodloe have been adequately refuted by affidavits and his contentions fail to indicate that the proposed assignee has assumed control of the stations prior to Commission authorization. The matters alleged do not present a prima facie case of premature assumption of control over the operations of the stations by the assignee, and do not present substantial and material questions of fact which would warrant further inquiry.

Concerning your claims of ownership over WFDR, Inc., we note that the Bankruptcy Court expressly rejected your arguments in ordering that the property of WFDR, Inc. be sold to Provident. Furthermore, you have not obtained an injunction from a court with authority to enjoin the sale of the stations. Under such circumstances, the Commission will not defer action on assignment or transfer application pending final resolution of disputed claims. The Commission has neither the jurisdiction nor the machinery to adjudicate claims of the nature alleged by you. Such claims must be settled privately or in a court of competent jurisdiction using local law.

In view of the foregoing, your objections to the grant of the applications ARE DENIED. Upon finding that the applicants are qualified and that a grant of the applications will serve the public interest, the Chief, Broadcast Bureau, pursuant to delegated authority, has this dated granted the applications for the acquisition of WFDR-AM-FM by Provident Broadcasting Company.

Sincerely yours,

Roy J. Stewart
Chief, Renewal and Transfer Division
Broadcast Bureau

cc: Eric S. Kravetz, Esq
Julian Freret, Esq.

APPENDIX 10

Petitioner Jack Whitehorn's letter
to Federal Communications Commission
dated May 27, 1981

Advises Commission of attempted transfer
of petitioner's property right, as
randomly observed by reading of
weekly broadcasting publication

Said transfer by third party,
without question,
a fraudulent conveyance

May 27, 1981

Mr. William J. Tricarico, Secretary
Federal Communications Commission
1919 M Street, N. W.
Washington, D. C. 20554

Re: WFDR-AM, WFDR-FM,
Manchester, Georgia

Dear Mr. Tricarico:

I read in the May 25, Broadcasting that Provident Broadcasting Company, 1985 Monroe Drive, N. E., Atlanta, Georgia 30324, is seeking a transfer of WFDR-AM, WFDR-FM, in Manchester, Georgia.

The seller is listed as being Jack Whitehorn. At this time, there is a dispute in United States Bankruptcy Court in the Northern District of Georgia, Newnan Division, Jack R. Whitehorn, Mary Ruth Whitehorn, Case No. 81-0039N.

It is my position as 100 per cent stockholder and the licensee of the stations, WFDR-AM, WFDR-FM, that WFDR, Inc., debtor-in-possession does not have legal title to the stations and that any transfer to Provident would be an unauthorized transfer of control.

Please accept this letter as a petition to deny this application signed April 28, 1981, by Provident Broadcasting Company. Also, please include me in the certification of service for all actions taken with regards to this application.
Please use this letter to formally stay the transfer precedings [sic] of WFDR, Inc., stations, WFDR-AM,

WFDR-FM, Manchester, Georgia, until such time as all the issues of ownership are resolved.

Enclosed is a copy of pleadings filed in the Bankruptcy Court in Georgia. Please associate these with this petition to deny.

If you require any additional information, please contact me in the near future. Please address correspondence to Jack Whitehorn, 2707 Colanthe Avenue, Las Vegas, Nevada 89102.

Respectfully submitted,

WFDR, INC.

Jack Whitehorn
One Hundred Per Cent Stockholder

mw
Enclosures

cc: Chief of Transfer Branch
Federal Communications Commission
1919 M Street, N. W.
Washington, D. C. 20554

APPENDIX 11

Letters from Ownership Files of
Federal Communications Commission

Letter of Respondent Murphy
setting forth direct fraud
as discussed fully in Petition herein
and the crux of the complaint

(Said letter filed as part of
Assignment and Transfer Application)

Res judicata precluded

July 14, 1981

VIA FEDERAL EXPRESS
#678246575

Julian Freret, Esquire
Booth & Freret
1302 18th Street, N.W.
Washington, D.C. 20036

RE: WFDR, Inc.

Dear Julian:

On June 29, 1981, the U.S. Bankruptcy Court, Northern District of Georgia, Newnan Division, entered an Order Confirming Plan, wherein it approved WFDR, Inc.'s Plan of Reorganization under Chapter 11 of the Bankruptcy Code. As you know, this Plan proposed the purchase of 100% of WFDR, Inc.'s stock by Provident Broadcasting Company, subject to the approval of the Federal Communications Commission.

I understand that the Commission's staff has inquiried [sic] as to how WFDR, Inc., the corporation whose stock is being purchased by Provident, will reobtain title to the assets which it owned prior to the institution of the bankruptcy proceeding, and now held by "WFDR, Inc., Debtor-in-Possession". Pursuant to the terms of the Plan and by statute, the Court's Order Confirming Plan will accomplish this automatically upon FCC approval of Provident's purchase of control of WFDR, Inc. Bankruptcy Code §1141(b), 11 U.S.C. §1141(b) provides that "the confirmation of the Plan vests all of the property of the estate in the Debtor". In essence, then, at the same time that Provident purchases the stock of WFDR, Inc. pursuant to the Plan of Reorganization, the Debtor-in-Possession will dissolve, and WFDR, Inc. will thereupon own the corporate assets.

The transfer of control of WFDR, Inc. to Provident and the vesting of assets in WFDR, Inc. will thus be simultaneous.

While both transfer of control and revesting of assets by assignment will result from the same transaction (i.e., Provident's stock purchase), they can be regarded as a two-step process, if the FCC must separately approve both the assignment and the transfer of control. For this purpose, WFDR, Inc., Debtor-in-Possession, will assign its rights as licensee of stations WFDR and WFDR-FM to WFDR, Inc. pursuant to the Order Confirming Plan thereby reversing the process which the FCC approved on June 19, 1980 (BAL-800527HW, BALH-800527HV). Then Provident will purchase the stock of the Licensee, as requested in the transfer of control application filed with the FCC on April 28, 1981 (BTC810428HV, BTC-810428HW). The owner of the stock of WFDR, Inc. will then, of course, also have control of the assets.

I trust that the above brief explanation of bankruptcy law will be sufficient for your purposes.

Very truly yours,

Margaret H. Murphy

MHM:tl

July 16, 1981

Mr. William J. Tricarico
Secretary
Federal Communications Commission
Washington, D.C. 20554

ATTN: Stuart Bedell, Esquire

RE: WFDR, Inc. (WFDR and WFDR-FM)
Manchester, Georgia -
Assignment of License

Dear Mr. Tricarico:

The captioned stations are presently licensed to WFDR, Inc., Debtor in Possession, pursuant to authority granted by the Commission in accord with application BAL800527HW and BAL800527HV).

The United States Bankruptcy Court, Northern District of Georgia, Newnan Division, has approved acquisition of WFDR and WFDR-FM by Provident Broadcasting Company and a pending Transfer of Control Application awaits action by the Commission.

In accord with most helpful suggestions by a member of the Commission's staff, there is enclosed herewith an original and two copies of FCC form 316, with accompanying exhibits, which will permit assignment of applicable licenses from WFDR, Inc., Debtor in Possession to WFDR, Inc. An opinion letter from Bankruptcy Counsel in Georgia affirms the purpose of the attached application and the appropriateness of its submission to the Commission.

Accordingly, it is respectfully requested that the Application for Transfer and the enclosed Application for

Assignment be granted simultaneously. Moreover, it is also respectfully requested that the enclosed application be granted expedited consideration and consideration by the Transfer and Assignment staff for immediate action, particularly since the financial situation confronting both stations is critical and in fact WFDR (AM) is presently off the air as a result of lack of funds for continued operation and replacement of its out-of-service transmitter.

The expedited action requested would serve the public interest, convenience, and necessity to the fullest extent.

Yours very truly,

Julian P. Freret
Counsel for WFDR, Debtor in Possession

JPF:tb
encl.

APPENDIX 12

United States Constitution

Amendment V

Amendment VII

Amendment XIV

Amendment V

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be derpived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective

numbers, counting the whole number of persons in each State excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX 13

U.S.C., Title 47 § 151

U.S.C., Title 47 § 301

U.S.C., Title 47 § 303

U.S.C., Title 47 § 309

U.S.C., Title 47 § 310

§ 151. Purposes of chapter; Federal Communications Commission created

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided and which shall execute and enforce the provisions of this chapter. June 19, 1934, c. 652, Title I, § 1, 48 Stat. 1064; May 20, 1937, c. 229, 1, 50 Stat. 189.

§ 301. License for radio communication or transmission of energy

It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from

one place in any State, Territory, or possession of the United States or in the District of Columbia to another place in the same State, Territory, possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States (except as provided in section 303(t) of this title); or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter.

(As amended Sept. 13, 1983, Pub. L. 97-259, Title I, §§ 107, 111(b), 96 Stat. 1091, 1093.)

§ 303. Powers and duties of Commission

Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall

(a) Classify radio stations;

(b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;

(c) Assign bands of frequencies to the various classes of stations, and assign frequencies for each individual station and determine the power which each station shall use and the time during which it may operate;

(d) Determine the location of classes of stations or individual stations;

(e) Regulate the kind of apparatus to be used with respect to its external effects and the purity and sharpness of the emissions from each station and from the apparatus therein;

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this chapter: *Provided, however,* That changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, after a public hearing, the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this chapter will be more fully complied with;

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

(h) Have authority to establish areas or zones to be served by any station;

(i) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting;

(j) Have authority to make general rules and regulations requiring stations to keep such records of programs, transmissions of energy, communications, or signals as it may deem desirable;

(k) Have authority to exclude from the requirements of any regulations in whole or in part any radio station upon railroad rolling stock, or to modify such regulations in its discretion;

(l) Have authority to prescribe the qualifications of station operators, to classify them according to the duties to be performed, to fix the forms of such licenses, and to issue them to such citizens or nationals in the United States as the Commission finds qualified, except that in issuing licenses for the operation of radio stations on aircraft the Commission may, if it finds that the public interest will be served thereby, waive the requirement of citizenship in the case of persons holding United States pilot certificates or in the case of persons holding foreign aircraft pilot certificates which are valid in the United States on the basis of reciprocal agreements entered into with foreign governments;

(m) (1) Have authority to suspend the license of any operator upon proof sufficient to satisfy the Commission that the licensee--

> (A) has violated any provision of any Act, treaty, or convention binding on the United States which the Commission is authorized to administer, or any regulation made by the Commission under any such Act, treaty, or convention; or

(B) has failed to carry out a lawful order of the master or person lawfully in charge of the ship or aircraft on which he is employed; or

(C) has willfully damaged or permitted radio apparatus or installations to be damaged; or

(D) has transmitted superfluous radio communications or signals or communications containing profane or obscene words, language, or meaning, or has knowingly transmitted--

(1) false or deceptive signals or communications, or

(2) a call signal or letter which has not been assigned by proper authority to the station he is operating; or

(E) has willfully or maliciously interfered with any other radio communications or signals; or

(F) has obtained or attempted to obtain, or has assisted another to obtain or attempt to obtain, an operator's license by fraudulent means.

(2) No order of suspension of any operator's license shall take effect until fifteen days' notice in writing thereof, stating the cause for the proposed suspension, has been given to the operator licensee who may make written application to the Commission at any time within said fifteen days for a hearing upon such order. The notice to the operator licensee shall not be effective until actually received by him, and from that time he shall have fifteen days in which to mail the said application. In the event that physical conditions prevent mailing of the application at the expiration of the fifteen-day period, the application shall then be mailed as soon as possible

thereafter, accompanied by a satisfactory explanation of the delay. Upon receipt by the Commission of such application for hearing, said order of suspension shall be held in abeyance until the conclusion of the hearing which shall be conducted under such rules as the Commission may prescribe. Upon the conclusion of said hearing the Commission may affirm, modify, or revoke said order of suspension.

(n) Have authority to inspect all radio installations associated with stations required to be licensed by any Act or which are subject to the provisions of any Act, treaty, or convention binding on the United States, to ascertain whether in construction, installation, and operation they conform to the requirements of the rules and regulations of the Commission, the provisions of any Act, the terms of any treaty or convention binding on the United States, and the conditions of the license or other instrument of authorization under which they are constructed, installed, or operated.

(o) Have authority to designate call letters of all stations;

(p) Have authority to cause to be published such call letters and such other announcements and data as in the judgment of the Commission may be required for the efficient operation of radio stations subject to the jurisdiction of the United States and for the proper enforcement of this chapter;

(q) Have authority to require the painting and/or illumination of radio towers if and when in its judgment such towers constitute, or there is a reasonable possibility that they may constitute, a menace to air navigation.

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law,

as may be necessary to carry out the provisions of this chapter, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

(s) Have authority to require that apparatus designed to receive television pictures broadcast simultaneously with sound be capable of adequately receiving all frequencies allocated by the Commission to television broadcasting when such apparatus is shipped in interstate commerce, or is imported from any foreign country into the United States, for sale or resale to the public. June 19, 1934, c. 652, Title III, § 303, 48 Stat. 1082; May 20, 1937, c. 229, §§ 5, 6(a), (b), 50 Stat. 190, 191; Aug. 28, 1958, Pub.L. 85-817, § 1, 72 Stat. 981; Apr. 27, 1962. Pub.L. 87-445, 76 Stat. 64; July 10, 1962, Pub.L. 87-529, § 1, 76 Stat. 150.

§ 309. Application for license--Considerations in granting application

(a) Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

Time of granting application

(b) Except as provided in subsection (c) of this section, no such application --

(1) for an instrument of authorization in the case of a station in the broadcasting or common carrier services, or

(2) for an instrument of authorization in the case of a station in any of the following categories:

(A) fixed point-to-point microwave stations (exclusive of control and relay stations used as integral parts of mobile radio systems),

(B) industrial radio positioning stations for which frequencies are assigned on an exclusive basis,

(C) aeronautical en route stations,

(D) aeronautical advisory stations,

(E) airdrome control stations,

(F) aeronautical fixed stations, and

(G) such other stations or classes of stations, not in the broadcasting or common carrier services, as the Commission shall by rule prescribe,

shall be granted by the Commission earlier than thirty days following issuance of public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereof.

Applications not affected by subsection (b)

(c) Subsection (b) of this section shall not apply--

(1) to any minor amendment of an application to which such subsection is applicable, or

(2) to any application for--

(A) a minor change in the facilities of an authorized station,

(B) consent to an involuntary assignment or transfer under section 310(b) of this title or to an assignment or transfer thereunder which does not involve a substantial change in ownership or control,

(C) a license under section 319(c) of this title or, pending application for a grant of such license, any special or temporary authorization to permit interim operation to facilitate completion of authorized construction or to provide substantially the same service as would be authorized by such license,

(D) extension of time to complete construction of authorized facilities,

(E) an authorization of facilities for remote pickups, studio links and similar facilities for use in the operation of a broadcast station,

(F) authorizations pursuant to section 325(b) of this title where the

programs to be transmitted are special events not of a continuing nature,

(G) a special temporary authorization for nonbroadcast operation not to exceed thirty days where no application for regular operation is contemplated to be filed or pending the filing of an application for such regular operation, or

(h) an authorization under any of the proviso clauses of section 308(a) of this title.

Petition to deny application; time, contents; reply; findings

(d) (1) Any party in interest may file with the Commission a petition to deny any application (whether as originally filed ar as amended) to which subsection (b) of this section applies at any time prior to the day of Commission grant thereof without hearing or the day of formal designation thereof for hearing; except that with respect to any classification of applications, the Commission from time to time by rule may specify a shorter period (no less than thirty days following the issuance of public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereof), which shorter period shall be reasonably related to the time when the applications would normally be reached for processing. The petitioner shall serve a copy of such petition on the applicant. The petition shall contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be prima facie inconsistent with subsection (a) of this section. Such allegations of fact shall, except for those of

which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof. The applicant shall be given the opportunity to file a reply in which allegations of fact or denials thereof shall similarly be supported by affidavit.

(2) If the Commission finds on the basis of the application, the pleadings filed, or other matters which it may officially notice that there are no substantial and material questions of fact and that a grant of the application would be consistent with subsection (a) of this section, it shall make the grant, deny the petition, and issue a concise statement of the reasons for denying the petition, which statement shall dispose of all substantial issues raised by the petition. If a substantial and material question of fact is presented or if the Commission for any reason is unable to find that grant of the application would be inconsistent with subsection (a) of this section, it shall proceed as provided in subsection (e) of this section.

Hearings; intervention; evidence; burden of proof

(e) If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest, if any, who are not notified by the Commission o such action may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest at any time not less than ten days prior to the date of hearing. Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be

permitted to participate. The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission.

Temporary authorization of emergency operations under subsection (b)

(f) When an application subject to subsection (b) of this section has been filed, the Commission, notwithstanding the requirements of such subsection, may, if the grant of such application is otherwise authorized by law and if it finds that there are extraordinary circumstances requiring emergency operations in the public interest and that delay in the institution of such emergency operations would seriously prejudice the public interest, grant a temporary authorization, accompanied by a statement of its reasons therefor, to permit such emergency operations for a period not exceeding ninety days, and upon making like findings may extend such temporary authorization for one additional period not to exceed ninety days. When any such grant for a temporary authorization is made, the Commission shall give expeditious treatment to any timely filed petition to deny such application and to any petition for rehearing of such grant filed under section 405 of this title.

Classification of applications

(g) The Commission is authorized to adopt reasonable classifications of applications and amendments in order to effectuate the purposes of this section.

Form and conditions of station licenses

(h) Such station licenses as the Commission may grant shall be in such general form as it may prescribe, but each license shall contain, in addition to other provisions, a statement of the following conditions to which such license shall be subject: (1) The station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized therein; (2) neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of this chapter; (3) every license issued under this chapter shall be subject in terms to the right of use or control conferred by section 606 of this title. June 19, 1934, c. 652, Title III, § 309, 48 Stat. 1085; July 16, 1952, c. 879, § 7, 66 Stat. 715; Mar. 26, 1954, c. 110, 68 Stat. 35; Jan. 20, 1956, c. 1, 70 Stat. 3; Sept. 13, 1960, Pub.L. 86-752, § 4(a), 74 Stat. 889.

§ 310. License ownership restrictions

(a) Grant to or holding by foreign government or representative

The station license required under this chapter shall not be granted to or held by any foreign government or the representative thereof.

(b) Grant to or holding by alien or representative, foreign corporation, etc.

No broadcast or common carrier or aeronautical en route or aeronautical fixed radio station license shall be granted to or held by--

(1) any alien or the representative of any alien;

(2) any corporation organized under the laws of any foreign government;

(3) any corporation of which any officer or director is an alien or of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representative thereof or by any corporation organized under the laws of a foreign country;

(4) any corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or revocation of such license.

(c) Authorization for aliens licensed by foreign governments; bilateral agreement between United States and foreign country as prerequisite

In addition to amateur station licenses which the Commission may issue to aliens pursuant to this chapter, the Commission may issue authorizations, under such conditions and terms as it may prescribe, to permit an alien licensed by his government as an amateur radio operator to operate his amateur radio station licensed by his government in the United States, its possessions, and the Commonwealth of Puerto Rico provided there is in effect a bilateral agreement between the United States and the alien's government for such operation on a reciprocal basis by United States amateur radio operators. Other provisions of this chapter and of subchapter II of chapter 5, and chapter 7, of Title 5 shall not be applicable to any request or application for or

modification, suspension, or cancellation of any such authorization.

(d) Assignment and transfer of construction permit or station license

No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. Any such application shall be disposed of as if the proposed transferee or assignee were making application under section 308 of this title for the permit or license in question; but in acting thereon the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee.

(e) Administration of regional concentration rules for broadcast stations

(1) In the case of any broadcast station, and any ownership interest therein, which is excluded from the regional concentration rules by reason of the savings provision for existing facilities provided by the First Report and Order adopted March 9, 1977 (docket No. 20548; 42 Fed. Reg. 16145), the exclusion shall not terminate solely by reason of changes made in the technical facilities of the station to improve its service.

(2) For purposes of this subsection, the term "regional concentration rules" means the provisions of sections 73.35, 73.240 and 73.636 of title 47, Code of

Federal Regulations (as in effect June 1, 1983), which prohibit any party from directly or indirectly owning, operating, or controlling three broadcast stations in one or several services where any two of such stations are within 100 miles of the third (measured city-to-city), and where there is a primary service contour overlap of any of the stations.

(As amended May 28, 1964, Pub.L. 88-313, § 2, 78 Stat. 202; Aug. 10, 1971, Pub.L. 92-81, § 2, 85 Stat. 302; Nov. 30, 1974, Pub.L. 93-505, § 2. 88 Stat. 1576; Dec. 8, 1983, Pub.L. 98-214, § 7, 97 Stat. 1469.)

APPENDIX 14

Federal Communications Rule

§ 73.3540

FEDERAL COMMUNICATIONS COMMISSION RULES

§ 73.3540 Application for voluntary assignment or transfer of control

(a) Prior consent of the FCC must be obtained for a voluntary assignment or transfer of control.

(b) Application should be filed with the FCC at least 45 days prior to the contemplated effective date of assignment or transfer of control.

(c) Application for consent to the assignment of construction permit or license must be filed on FCC Form 314 "Assignment of license" or FCC Form 316 "Short form" (See paragraph (f) of this section).

(d) Application for consent to the transfer of control of a corporation holding a construction permit or license must be filed on FCC Form 315 "Transfer of Control" or FCC form 316 "Short form" (see paragraph (f) of this section).

(e) Application for consent to the assignment of construction permit or license or to the transfer of control of a corporate licensee or permittee for an FM or TV translator station, a low power TV station and any associated auxiliary station, such as translator microwave relay stations and UHF translator booster stations, only must be filed on FCC Form 345 "Application for Transfer of Control of Corporate Licensee or Permittee, or Assignment of License or Permit for an FM or TV translator Station, or a Low Power TV Station."

(f) The following assignment or transfer applications may be filed on FCC "Short form" 316:

(1) Assignment from an individual or individuals (including partnerships) to a corporation owned and controlled by such individuals or partnerships without any substantial change in their relative interests;

(2) Assignment from a corporation to its individual stockholders without effecting any substantial change in the disposition of their interests;

(3) Assignment or transfer by which certain stockholders retire and the interest transferred is not a controlling one;

(4) Corporate reorganization which involves no substantial change in the beneficial ownership of the corporation;

(5) Assignment or transfer from a corporation to a wholly owned subsidiary thereof or vice versa, or where there is an assignment from a corporation to a corporation owned or controlled by the assignor stockholders without substantial change in their interest; or

(6) Assignment of less than a controlling interest in a partnership.

[44 FR 38496, July 2, 1979, as amended at 48 FR 21486, May 12, 1983; 49 FR 47843, Dec. 7, 1984; 50 FR 32416, Aug. 12, 1985]

APPENDIX 15

U.S.C. Title 18 § 1961

U.S.C. Title 18 § 2516

§ 1961. Definitions

As used in this chapter--

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery_, section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 8910894 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement, section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging

in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2251-2252 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employees of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

Added Pub.L. 91-452, Title IX, § 901(a), Oct 15, 1970, 84 Stat. 941 and amended Pub.L. 95-575, § 3(c), Nov. 2, 1978, 92 Stat. 2465; Pub.L. 95-598, Title III, § 314(g), Nov. 6, 1978, 92 Stat. 2677; Pub.L. 98-473, Title II, §§ 901(g), 1020, Oct. 12, 1984, 98 Stat. 2136, 2143; Pub.L. 98-547, Title II, § 205, Oct. 25, 1984, 98 Stat. 2770; Pub.L. 99-570, Title I, § 1365(b), Oct. 27, 1986, 100 Stat. 3207-35; Pub.L. 99-646, § 50(a), Nov. 10, 1986, 100 Stat. 3605; Pub.L. 100-690, Title VII, §§ 7013, 7019(c), 7054, 7514, Nov. 18, 1988, 102 Stat. 4395, 4396, 4398, 4402, 4489; Pub.L. 101-73, Title IX, § 968, Aug. 9, 1989, 103 Stat. 506.

§ 2516. Authorization for interception of wire, oral, or electronic communications

(1) The Attorney General, Deputy Attorney, Associate Attorney General, or any Assistant Attorney General, any acting Assistant Attorney General, or any Deputy Assistant Attorney General in the Criminal Division specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in

conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of--

(a) any offense punishable by death or by imprisonment for more than one year under sections 2274 through 2277 of title 42 of the United States Code (relating to the enforcement of the Atomic Energy Act of 1954), section 2284 of title 42 of the United States Code (relating to sabotage of nuclear facilities or fuel), or under the following chapters of this title: chapter 37 (relating to espionage), chapter 105 (relating to sabotage), chapter 115 (relating to treason), chapter 102 (relating to riots), chapter 65 (relating to malicious mischief, chapter 111 (relating to destruction of vessels), or chapter 81 (relating to piracy);

(b) a violation of section 186 or section 501(c) of title 29, United States Code (dealing with restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under this title;

(c) any offense which is punishable under the following sections of this title: section 201 (bribery of public officials and witnesses), section 224 (bribery in sporting contests), subsection (d), (e), (f), (g), (h), or (i) section 844 (unlawful use of explosives), section 1084 (transmission of wagering information), section 751 (relating to escape), sections 1503, 1512, and 1513 (influencing or

injuring an officer, juror, or witness generally), section 1510 (obstruction of criminal investigations), section 1511 (obstruction of State or local law enforcement), section 1751 (Presidential and Presidential staff assassination, kidnaping, and assault), section 1951 (interference with commerce by threats or violence), section 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), section 1958 (relating to use of interstate commerce facilities in the commission of murder for hire), section 1959 (relating to violent crimes in aid of racketeering activity), section 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 1955 (prohibition of business enterprises of gambling), section 1956 (laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 664 (embezzlement from pension and welfare funds) section 1343 (fraud by wire, radio, or television), sections 2251-2252 (relating to sexual exploitation of children), sections 2312, 2313, 2314, and 2315 (interstate transportation of stolen property), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), section 1203 (relating to hostage taking), section 1029 (relating to fraud and related activity in connection with access devices), section 3146 (relating to penalty for failure to appear), section 3521(b)(3) (relating to witness relocation and assistance), section 32 (relating to destruction of aircraft or aircraft facilities), section 1963 (violations with respect to racketeer influenced and corrupt organizations), section 115 (relating to threatening or retaliating against a Federal official), the section in chapter 65 (relating to

destruction of an energy facility), and section 1341 (relating to mail fraud), or section 351 (violations with respect to congressional, Cabinet, or Supreme Court assassinations, kidnaping, and assault), section 831 (relating to prohibited transactions involving nuclear materials), section 33 (relating to destruction of motor vehicles or motor vehicle facilities), or section 1992 (relating to wrecking trains);

(d) any offense involving counterfeiting punishable under section 471, 472, or 473 of this title;

(e) any offense involving fraud connected with a case under title 11 or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States;

(f) any offense including extortionate credit transactions under sections 892, 893, or 894 of this title;

(g) a violation of section 5322 of title 31, United States Code (dealing with the reporting of currency transactions);

(h) any felony violation of sections 2511 and 2512 (relating to interception and disclosure of certain communications and to certain intercepting devices) of this title;

(i) any felony violation of chapter 71 (relating to obscenity) of this title;

(j) any violation of section 1679a(c)(2) (relating to destruction of a natural gas pipeline) or subsection (i) or (n) of section 1472 (relating to aircraft piracy) of title 49, of the United States Code

(k) any criminal violation of section 2778 of title 22 (relating to the Arms Export Control Act);

(l) the location of any fugitive from justice from an offense described in this section; or

(m)[1] any conspiracy to commit any of the foregoing offenses.

(m)[1] any felony violation of sections 922 and 924 of title 18, United States Code (relating to firearms); and

(n) any violation of section 5861 of the Internal Revenue Code of 1986 (relating to firearms).

(2) The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire, oral, or electronic communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire, oral, or electronic communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is

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[1] So in original. Two subsec. "(m)"s were enacted.

made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

(3) Any attorney for the Government (as such term is defined for the purposes of the Federal Rules of Criminal Procedure) may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this title, an order authorizing or approving the interception of electronic communications by an investigative or law enforcement officer having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of any Federal felony.

Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 216 and amended Pub.L. 91-452, Title VIII, § 810, Title IX, § 902(a)k Title XI, 1103, Oct. 15, 1970, 84 Stat. 940, 947, 959; Pub.L. 91-644, Title IV, § 16, Jan 2, 1971, 84 Stat. 1891; Pub.L.. 95-598, Title III, § 314(h), Nov. 6, 1978, 92 Stat. 2677; Pub.L. 97-285, §§ 2(e), 4(e), Oct. 6, 1982, 96 Stat. 1220, 1221; Pub.L. 98-292, § 8, May 21, 1984, 98 Stat. 206; Pub.L. 98-473, Title II, § 1203(c), Oct. 12, 1984, 98 Stat. 2152; Pub.L. 99-508, Title I, §§ 101(c)(1)(A), 104, 105, Oct. 21, 1986, 100 Stat. 1851, 1855; Pub.L. 99-570, Title I, § 1365(c), Oct. 27, 1986, 100 Stat. 3207-35; Pub.L. 100-690, Title VI, § 6461, Title VII, §§ 7036, 7053(d), 7525, Nov. 18, 1988, 102 Stat. 4374, 4499, 4402, 4502.

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(3)

FILED
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CASE NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JACK R. WHITEHORN and
MARY RUTH WHITEHORN,

Petitioners,

vs.

MARGARET H. MURPHY,
SMITH, GAMBRELL & RUSSELL
and ROBERT M. GARSTIN,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the United States Court of Appeals for the Ninth Circuit appropriately affirmed the District Court's Order dismissing the action brought by Petitioners Whitehorn on the basis of *res judicata.*

II. Whether the United States Court of Appeals for the Ninth Circuit appropriately affirmed the District Court's Order dismissing the action brought by Petitioners Whitehorn on the basis of improper service of process on the Respondents.

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IN THE SUPREME COURT OF THE UNITED STATES

JACK R. WHITEHORN and
MARY RUTH WHITEHORN,
Petitioners,

vs.

MARGARET H. MURPHY,
SMITH, GAMBRELL & RUSSELL
and ROBERT M. GARSTIN,
Respondents.

CASE NO.

DECISION BELOW

The August 21, 1990 decision of the United States Court of Appeals for the Ninth Circuit in Case No. 88-0541 affirming the decision of the District Court is unreported. The June 6, 1989 decision of the United States District Court for the District of Nevada dismissing the action by petitioners is unreported. The May 26, 1988 decision of the United States Court of Appeals for the Eleventh Circuit in Case No. 88-8018 affirming the decision of the District Court for the Northern District of Georgia is unreported. The December 21, 1987 decision of the United States District Court for the Northern District of Georgia affirming the order of the Bankruptcy Court is unreported.

STATUTORY PROVISIONS INVOLVED

This case involves 11 U.S.C. § 1141:

Effect of Confirmation

(a) Except as provided in subsections (d)(2) and (d)(3) of this section, the provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such

creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.

(b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

(c) Except as provided in subsections (d)(2) and (d)(3) of this section and except as otherwise provided in the plan or in the order confirming the plan, after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors, equity security holders, and of general partners in the debtor.

(d)(1)Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan -

(A) discharges the debtor from any debt that arose before the date of such confirmation, and any debt of a kind specified in section 502(g), 502(h) or 502(i) of this title, whether or not -

(i) a proof of claim based on such debt is filed or deemed filed under section 501 of this title;

(ii) such claim is allowed under section 502 of this title; or

(iii) the holder of such claim has accepted the plan; and

(B) terminates all rights and interests of equity security holders and general partners provided for by the plan.

(2) The confirmation of a plan does not discharge an individual debtor from any debt excepted from discharge under section 523 of this title.

(3) The confirmation of a plan does not discharge a debtor if -

(A) The plan provides for the liquidation of all or substantially all of the property of the estate;

(B) The debtor does not engage in business after consummation of the plan; and

(C) The debtor would be denied a discharge under section 727(a) of this title if the case were a case under chapter 7 of this title.

(4) The court may approve a written waiver of discharge executed by the debtor after the order for relief under this chapter.

This case also involves 11 U.S.C. § 1109:

Right to be Heard

(a) The Securities and Exchange Commission may raise and may appear and be heard on any issue in a case under this chapter, but the Securities and Exchange Commission may not appeal from any judgment, order, or decree entered in the case.

(b) A party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter.

STATEMENT OF THE CASE

This case is best summarized by the statement in the Order of the United States District Court for the Northern District of Georgia in the earlier related action that Petitioners' claims have been "litigated to at least four separate conclusions in ten different proceedings in bankruptcy, district and appellate courts in Nevada and Georgia." District Court Order, Petitioners' Appendix, p. 15. Every court that has been confronted by the flood of claims raised by Petitioners

subsequent to the bankruptcy proceedings detailed below has agreed that all of Petitioners' claims were fully and finally litigated or should have been raised in the earlier proceedings and therefore that Petitioners' latest action is barred by the doctrine of *res judicata*. There exists absolutely no basis for this Court to decide differently.

Jack R. Whitehorn and Mary Ruth Whitehorn ("Petitioners") filed a Complaint on July 1, 1989 in the United States District Court for the District Of Nevada (the "Complaint"). The Complaint seeks damages allegedly caused to Petitioners by Margaret H. Murphy, Esq., the law firm of Smith, Gambrell & Russell,[1] Robert M. Garstin and William T. Burke[2] arising out of the handling of the bankruptcy of WFDR, Inc. ("WFDR") by Respondents. Respondents filed a Motion to Dismiss and a Motion for Judgment on the Pleadings or for Summary Judgment. On April 24, 1989, the District Court granted Respondents' Motion for Judgment on the Pleadings and Summary Judgment, finding that the Petitioners had already fully litigated their claims or should have raised the claims brought in Nevada in the bankruptcy action that had been fully and finally litigated in Georgia. Therefore, the action was barred by the doctrine of *res judicata*. In addition, that Order granted Respondents' Motion to Dismiss for insufficient service of process.

By Order dated August 21, 1980, the United States Court of Appeals for the Ninth Circuit affirmed the District Court's decision on the same grounds as stated in that decision. The Court of Appeals reiterated that *res judicata* bars the Whitehorns' Complaint and that the Whitehorns improperly served the Respondents. In addition, the Court of

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[1] Hereinafter Margaret H. Murphy, Esq. and Smith, Gambrell & Russell will be referred to individually as "Murphy" and "SG&R" and collectively as "Respondents." Respondents acted as counsel to WFDR in its bankruptcy case and related proceedings.

[2] Robert M. Garstin was president of WFDR during its bankruptcy proceedings and William T. Burke was counsel for Dr. John Whitehorn in the WFDR bankruptcy proceedings. Burke was dismissed for lack of personal jurisdiction.

Appeals found that the appeal was frivolous and warned the Whitehorns that any further litigation regarding the sale of WFDR would result in sanctions.

The facts preceding the filing of the Complaint are not in dispute, the Bankruptcy Court in the Northern District of Georgia having resolved these matters on cross-motions for summary judgment.[3]

On March 28, 1980, Petitioner Jack Whitehorn executed a Stock Option Agreement in favor of his brother, Dr. John Whitehorn (hereinafter the "Stock Option Agreement"). The Stock Option Agreement included a proxy granting voting authority over Petitioners' 100% stock interest in WFDR, and an option to acquire Petitioners' stock in WFDR.

On May 9, 1980, WFDR filed a voluntary petition under Chapter 11 of the United States Bankruptcy Code, case no. 80-00936N, in the United States Bankruptcy Court for the Northern District of Georgia. After unsuccessfully challenging various aspects of the WFDR Chapter 11 proceeding, Petitioners filed a voluntary individual petition under Chapter 11 in Nevada on October 6, 1980.

On July 22, 1980, in the Northern District of Georgia, and on December 11, 1980, in the District of Nevada, Petitioners initiated adversary proceedings against Dr. John Whitehorn contesting ownership of the stock and control of WFDR. On January 30, 1981, the Nevada court transferred the Nevada adversary proceeding to the Northern District of Georgia for consolidation.

On January 30, 1981, WFDR filed an application to liquidate its assets in the United States Bankruptcy Court for the Northern District of Georgia. Petitioners objected to the application both as alleged creditors of WFDR and claiming sole ownership of WFDR. Following notice and a hearing, the

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[3] The following account is based on the Order of the United States Bankruptcy Court for the Northern District of Georgia, Case No. BK-LV-80-00936N, Adversary No. 87-0002N, dated July 31, 1987 (Petitioners' Appendix at 36).

bankruptcy court entered an order on March 16, 1981, approving the sale of assets for $790,000.00 to Lake George Corporation, predecessor in interest to Provident Broadcasting Company (hereinafter "Provident"). On April 8, 1981, the bankruptcy court denied Petitioners' motions for a new trial, for alteration or amendment of the judgment and for additional findings of fact. Petitioners appealed both orders (hereinafter collectively the "Orders Approving the Sale of Assets"), but did not seek a stay of the sale pending resolution of the appeal.

On May 27, 1981, WFDR filed an Amended Plan of Reorganization (hereinafter the "Amended Plan") which upon confirmation would implement the Orders Approving the Sale of Assets by canceling the outstanding stock of WFDR. Holders of stock, including Petitioners, would receive certificates of interest evidencing entitlement to the net proceeds of the liquidation, after payment of debts and claims owing by WFDR.

Petitioners filed objections to the disclosure statement and to confirmation of the Amended Plan on the grounds, inter alia, that the management of WFDR lacked the requisite corporate authority to file the Chapter 11 petition. On June 29, 1981, the bankruptcy court entered an order confirming the Amended Plan over Petitioners' objections. In the order confirming the Amended Plan, the bankruptcy court acknowledged the pending adversary proceeding between Petitioners and John Whitehorn concerning the ownership of WFDR, but stated that even if "Jack Whitehorn is proven to be the owner of all the stock of WFDR, Inc., despite his objection to the plan of reorganization, the plan should be confirmed pursuant to 11 U.S.C. 1129(b)(2)(C)." No appeal was filed from the order confirming the Amended Plan. The Amended Plan was thereafter fully consummated.

By order dated September 18, 1981, the United States District Court for the Northern District of Georgia dismissed Petitioners' appeal of the Orders Approving the Sale of Assets as moot "in that the amended plan providing for the sale of the stock in lieu of a sale of the assets has been approved and

consummated." The district court also noted that the order approving the sale of stock had not been appealed and no stay of the sale had been obtained. On August 17, 1983, the United States Court of Appeals for the Eleventh Circuit affirmed the district court's order dismissing Petitioners' appeal as moot because the order confirming the Amended Plan had not been appealed and because the sale authorized and implemented by the Amended Plan was not stayed.

On July 14, 1983, Respondents and the Committee of Unsecured Creditors of WFDR jointly filed an application to settle certain claims against the WFDR estate. The application provided, among other things, that upon partial payment of certain administrative and unsecured claims of Dr. John Whitehorn, Dr. John Whitehorn would relinquish any claim to proceeds of the shares of WFDR cancelled pursuant to the provisions of the Amended Plan. The application further provided that Petitioners' ownership interest in WFDR, evidenced by the newly issued certificates of interest tendered in exchange for the cancelled shares, was to be redeemed by the payment of $35,000 from the proceeds generated subsequent to the sale to Provident.

On January 26, 1984, the Bankruptcy Court approved the settlement in recognition and satisfaction of Petitioners' interest in WFDR. Proceeds from the liquidation were paid to Petitioners' attorneys for the benefit of Petitioners' individual estate upon specific authorization by order of the United States Bankruptcy Court for the District of Nevada. On November 15, 1984, a final decree was entered closing the estate of WFDR.

On April 3, 1986, Petitioners filed a "Complaint to Compel Turnover of Property" in the Bankruptcy Court for the District of Nevada. The action was transferred to the United States Bankruptcy Court for the Northern District of Georgia. In that action, Petitioners essentially asked the court to avoid the earlier transfer of the WFDR stock to Provident.

By Order dated July 31, 1987, the Bankruptcy Court entered summary judgment against the Petitioners, finding

that the WFDR stock was not affected by the automatic stay in the individual bankruptcy action in Nevada and that all of the claims raised in the action had been addressed previously or would have been addressed if raised. The court therefore found that the Complaint was barred by the doctrine of *res judicata.*

On appeal, the United States District Court for the Northern District of Georgia affirmed the Bankruptcy Court's decision by Order dated December 21, 1987. The Eleventh Circuit affirmed the District Court ruling and, after concluding that the appeal was frivolous, awarded double costs against Petitioners. Rehearing was denied.

Petitioners then sought a writ of certiorari from this Court. That petition was denied by Order dated February 21, 1989.

On July 1, 1988, while the petition for rehearing by the Eleventh Circuit was pending, Petitioners filed a complaint in the United States District Court for the District of Nevada seeking damages for fraud, conspiracy and racketeering activity allegedly arising out of the handling of the WFDR bankruptcy action by Respondents. Specifically, Petitioners alleged that they were damaged as a result of the deprivation of stock and assets, including FCC licenses, sold as a result of the WFDR bankruptcy.

Petitioners attempted service on Smith, Gambrell & Russell and Margaret H. Murphy by sending a copy of the Summons and Complaint by certified mail to Smith, Gambrell & Russell's office in Atlanta. No Form 18-A acknowledgement of service and no stamped return envelope was provided as required by Rule 4 of the Federal Rules of Civil Procedure.

By Order dated June 5, 1989, the United States District Court for the District of Nevada entered a detailed order finding that the same claims had been fully litigated in more than one action. District Court Order, Petitioners' Appendix, p. 15. The District Court dismissed the Complaint on the

basis that the claims were barred by the doctrine of *res judicata* and that service was improper under Rule 4 of the Federal Rules of Civil Procedure.

Petitioners appealed the decision to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit affirmed the decision of the District Court, adopting the District Court's decision and adding that the action was frivolous and that further proceedings on the same claims would be sanctioned. *See* Order dated August 21, 1990, Petitioners' Appendix, p.2.

SUMMARY OF THE ARGUMENT

The Amended Plan, having been confirmed and consummated, is *res judicata* as to all issues raised by Petitioners in the instant Petition. In addition, the various actions in Georgia and Nevada are full and final decisions and are therefore *res judicata* as to Petitioner's claims. All claims raised in Petitioner's Complaint should have been raised at the confirmation hearing on the WFDR plan of reorganization or in the original action in the Georgia court and cannot be used as a collateral attack on the Amended Plan.

Even if *res judicata* were inapplicable to this action, dismissal was proper because neither Murphy nor Smith, Gambrell & Russell was properly served. The Summons and Complaint were sent certified rather than first class mail, no return envelope was enclosed and no Form 18-A was furnished. In addition, service was attempted on Murphy by sending the Summons and Complaint to her former employer, Smith, Gambrell & Russell. Murphy had long since been appointed a Judge of the United States Bankruptcy Court for the Northern District of Georgia. Therefore, service was improper.

REASONS FOR DENYING THE WRIT

The Petition follows the determination by the Court of Appeals that the appeal to that court was frivolous. Consistent with that finding, Petitioners have failed to establish a reason for granting the Writ. The Petition for Writ of Certiorari is incomprehensible. Respondents are unable to glean any relevant argument from the Petition. Petitioners did not directly address either the question of whether *res judicata* applies or whether service was proper. Therefore, Respondents will attempt to address the issues actually before this Court on Petition for a Writ of Certiorari.

The decision below is consistent with decisions of other federal courts of appeals and the accepted and usual course of judicial proceedings. This case does not involve an important question of federal law which should be settled by this Court, and the decision below is in harmony with the applicable decisions of this Court. Moreover, the facts and procedural background of this case are so unique as to eliminate any significant precedential value of a review on the merits by this Court.

A. The Courts Below Correctly Applied Settled Law in Holding That the Complaint Is Barred By the Doctrine of *Res Judicata*.

All of the relevant claims and issues raised by the Complaint were previously addressed (or would have been addressed if raised) by the bankruptcy court in the WFDR bankruptcy case through the confirmation of the Amended Plan. In addition, the same or related claims were raised in the proceedings before the United States District Court for the Northern District of Georgia and the United States Court of Appeals for the Eleventh Circuit. Those courts have already determined that the decision of the Bankruptcy Court precludes any further litigation of issues arising out of the bankruptcy proceedings. This Court denied certiorari in that action on February 21, 1989. The effect of the automatic stay in Petitioners' individual bankruptcy action on the WFDR reorganization should have been litigated nine years ago, if at

all. The defense, even if meritorious, is now barred and superseded by the confirmation and consummation of the Amended Plan. Although Petitioners, who at the time were represented by counsel, objected to confirmation of the Amended Plan, they failed to raise the issue of the automatic stay. Moreover, Petitioners did not appeal the confirmation order.

Confirmed plans of reorganization have a binding *res judicata* effect on all parties.

> [T]he provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan and any creditor, equity security holder, or general partner in the debtor whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.

11 U.S.C. § 1141(a). All issues raised and all issues that could have been pled in objection to confirmation of the Amended Plan are *res judicata* and cannot now be asserted as a collateral attack on the Amended Plan. *See Southmark Properties v. Charles House Corporation*, 742 F.2d 862 (5th Cir. 1984). *See also* 5 Collier on Bankruptcy § 1141.01[1] (15th ed. 1987). *Res judicata* not only bars claims that actually were litigated in a previous proceeding, but reaches beyond the scope of collateral estoppel and bars litigation of claims that *could have been* litigated in the previous action. *Hotel Corp. of the South v. Rampart 920, Inc.*, 46 Bankr. 758, 767 (E.D. La. 1985), *aff'd*, 781 F.2d 901 (5th Cir. 1986). All of the issues raised by Petitioners, including the effect of the automatic stay, should have and could have been raised and litigated as objections to the Amended Plan.

The *Southmark Properties* decision is particularly apposite. In *Southmark Properties*, the United States Court of Appeals for the Fifth Circuit applied the doctrine of *res judicata* to a factual circumstance substantially similar to that of

the instant proceeding and barred relitigation of all issues that could have been raised as objections to confirmation. In *Southmark Properties,* the president and majority shareholder of the debtor corporation objected to the plan of reorganization. The objections were overruled by the bankruptcy court, but were subsequently renewed, albeit in recharacterized form, in a collateral attack on the confirmation order. The Fifth Circuit Court of Appeals held that the order confirming the sale and transfer of title of the property to Southmark were *res judicata.*

> For a prior judgment to bar an action on the basis of *res judicata,* the parties must be identical in both suits, the prior judgment must have been rendered by a court of competent jurisdiction, there must have been a final judgment on the merits and the same cause of action must be involved in both cases [citations omitted]. . . .

742 F.2d 862, 869. *In Southmark Properties,* the Court found that the plaintiff was actively involved in the bankruptcy proceedings and therefore become a party to them, or at least was in privity with the parties.

Similar to the plaintiff in *Southmark Properties,* Petitioners were a "party in interest" to the WFDR reorganization proceeding and are bound, as are all other parties in interest, by the terms and conditions of the Amended Plan. As an equity security holder in WFDR, petitioners were a party in interest to the confirmation proceedings by definition under 11 U.S.C. § 1109.

In addition, Petitioners filed proceedings in the district and bankruptcy courts in Georgia seeking the turnover of assets from the bankruptcy estate. Any claims of alleged damages arising from the Respondents' handling of the WFDR bankruptcy proceedings could and should have been raised in the Georgia action. In the earlier proceedings in Georgia, the Bankruptcy Court specifically determined that the actions taken in the WFDR bankruptcy action did not violate the automatic stay of the individual bankruptcy. The Court

found that Jack Whitehorn had received the benefit of stock ownership when, upon the sale of WFDR, Whitehorn was paid (through his attorneys) $35,000.[4]

The Court went on to find that, regardless of the fact that Petitioner had received value for his stock, the "court had jurisdiction as a result of WFDR's filing to issue orders approving the sale of assets or the cancellation of stock even if an individuals' stockholder's own bankruptcy case was pending in another jurisdiction." *Jack R. Whitehorn and Mary Ruth Whitehorn v. Smith, Gambrell & Russell and Margaret H. Murphy,* Adversary No. 87-002N (Bankr. N.D. Ga., July 31, 1987) (Petitioner's Appendix, p. 36), *aff'd,* No. C87-103N (N.D. Ga. December 21, 1987), *aff'd* 849 F.2d 1479 (11th Cir. 1988), *reh'g denied,* 854 F.2d 1326, cert. denied, ____ U.S. ____, 109 S.Ct. 567, 102 L.Ed.2d 592 (1988). Therefore, the issue of whether the sale of assets violated the automatic stay has been litigated and determined and Petitioners are precluded from reasserting the same claims or alleging claims related to those decided in the Georgia action in the later Nevada action.

Petitioners should not be heard to complain at this date, nine years after confirmation of the Amended Plan, that their due process rights were, in some unarticulated and inestimable fashion, violated. Petitioners' mistaken assumption that the filing of the individual Chapter 11 proceeding automatically stayed consummation of the Amended Plan and made an appeal of the confirmation order unnecessary is perhaps unfortunate, but such neglect or ignorance of legal rights and responsibilities, particularly when Petitioners were represented by competent counsel, does not serve to annul or abrogate the binding *res judicata* effect of the Amended Plan.

This Court in *Stoll v. Gottlieb* held that even a plan of reorganization which erroneously discharged certain personal guaranties was, nonetheless, *res judicata* and stated:

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[4] As discussed previously, in a settlement approved by the Bankruptcy Court, Dr. John Whitehorn relinquished any claim to ownership of the WFDR stock in return for payment of certain disputed claims.

> Courts to determine the rights of parties are an integral part of our system of government. It is just as important that there should be a place to end as that there should be a place to begin litigation. After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first.

305 U.S. 165, 172 (1938). The decision below is entirely consistent with the decisions of this Court and is based on settled law.

The only argument Petitioners make with regard to *res judicata* is that the Georgia courts did not re-try the issue of whether the FCC properly approved the sale of the licenses owned by WFDR. In its letter refusing to deny or defer transfer of control of the licenses from WFDR to Provident, the FCC specifically stated that the issue of ownership of the licenses and stock had already been determined by the Bankruptcy Court and that any remaining issues were legal issues rather than administrative issues. Appendix to Petition, pp. 64-67. Therefore, the issue of whether the FCC properly allowed the transfer of the licenses and other assets of WFDR was resolved in the Bankruptcy Court and in the related Georgia proceedings. No issue remains to be litigated or determined with regard to any aspect of the WFDR bankruptcy or any actions allegedly taken by Respondents in representing WFDR.

B. The Trial Court Properly Granted Respondents' Motion to Dismiss Pursuant to Rule 12(b)(5) Because Petitioners Failed to Serve Process on Respondents in a Proper Manner.

Petitioner does not address the issue of proper service except to say that, if service was improper, the Court need not have addressed the *res judicata* issue. A court is free to address any or all grounds raised as a basis for dismissal of an action. If Petitioners admit that service was improper, as it appears from their Petition, then the Petition should be deemed not to present any issue for hearing. Dismissal on the basis of improper service disposes of this case just as completely as does dismissal on the basis of *res judicata.*

In any event, the undisputed facts show that service was improper. Rule 4 of the Federal Rules of Civil Procedure provides that service on an individual shall be made

> Personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

Rule 4(c)(2)(C) provides

> a summons and complaint may be served upon a defendant . . . -
>
> (ii) by mailing a copy of the summons and complaint (by first class mail, postage prepaid) to the person to be served, together with two copies of the notice and acknowledgement conforming substantially to Form 18-A and a return envelope, postage prepaid, addressed to the sender.

In this case, the facts regarding Petitioners' attempt at service of process upon Murphy and SG&R are not in dispute. Service was attempted upon both Respondents by sending copies of the summons and complaint by certified mail to the offices of SG&R in Atlanta, Georgia on or about July 1, 1988. Judge

Murphy was no longer a partner in SG&R at that time, having assumed her duties as judge with the United States Bankruptcy Court for the Northern District of Georgia on October 19, 1987. No Form 18-A acknowledgement of service or stamped return envelope was served with the complaint and summons.

Service was improper because the summons and complaint were sent by certified mail rather than first class mail as required by Rule 4(c)(2)(C). *Haas v. Berrien County Sheriff's Department*, 658 F. Supp. 877, 880 (W.D. Mich. 1987). In addition, service was improper as to both Respondents because Petitioners failed to include with the summons and complaint a notice and acknowledgement conforming to Form 18-A and a stamped return envelope, as is required by Rule 4(c)(2)(C). *See, e.g., Norlock v. City of Garland*, 768 F.2d 654, 656-57 (5th Cir. 1985); *Quann v. Whitegate-Edgewater*, 112 F.R.D. 649, 652-54 (D. Md. 1986); *Madden v. Cleland*, 105 F.R.D. 520, 523 (N.D. Ga. 1985). Third, the attempted service does not satisfy subparagraph (C)(i) because neither Nevada nor Georgia law provides for service by certified mail. Nev. R. Civ. P. 4; O.C.G.A. § 9-11-4.

Finally, service was insufficient as to Judge Murphy for the additional reason that it was not proper under the requirements of Rule 4, Fed. R. Civ. P. Service upon Judge Murphy at her former office does not comply with the requirement that service be made to the individual's dwelling house or usual place of abode or upon an agent authorized by law to receive service on behalf of the individual. Fed. R. Civ. P. 4(c)(2)(C) and 4(d)(1). At the time of the attempted service, Judge Murphy had no affiliation with SG&R. Therefore, the law firm cannot be deemed to be her agent for purposes of service of process. *See, e.g., Roberts v. Bienert*, 183 Ga. App. 751, 360 S.E.2d 25 (1987) (service upon doctor at office of former partner not sufficient); *McKnight v. Webster*, 499 F. Supp. 420, 424 (E.D. Pa. 1980) (service upon police headquarters insufficient as to former police chief); *Granite Chemical Corp. v. Northeast Coal & Dock Corp.*, 249 F. Supp. 597,

598 (D. Me. 1966) (agency for service must exist at time of service).

At the trial court level, Petitioners argued that their service upon the Respondents complied with Bankruptcy Rule 7004, which allows service without an acknowledgement form accompanying the complaint in non-core bankruptcy proceedings. This case is not a bankruptcy proceeding, as was the case in *Windsor Communications Group, Inc. v. Grant*, 75 Bankr. 713 (E.D. Pa. 1985), cited by Petitioners in their brief before the Ninth Circuit. Therefore, the Federal Rules of Civil Procedure, not the Bankruptcy Rules, govern service in this action.

CONCLUSION

Because this action was properly dismissed on the basis of *res judicata* and on the basis that Respondents were never properly served with process in this action, the Writ of Certiorari should be denied.

Respectfully submitted,

Robert W. Beynart
Counsel of Record
for Respondents
Margaret H. Murphy and
Smith, Gambrell & Russell

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that I have served directly the requisite number of copies of the foregoing Brief in Opposition on:

Jack L. Whitehorn and Mary Ruth Whitehorn
5141 Indian River Drive
Box 377
Las Vegas, Nevada 89103

Carmine J. Colucci
Colucci & Amador
629 S. Sixth Street
Las Vegas, Nevada 89101

by placing same in the United States Mail, first class postage prepaid, this day of December, 1990. I further certify that all parties required to be served have been served.

Robert W. Beynart

Supreme Court, U.S.
FILED
DEC 22 1990
JOSEPH F. SPANIOL, JR.
CLERK

(4)

Case No. 90-820

In The

Supreme Court of the United States

October Term 1990

—o—

Jack R. Whitehorn and
Mary Ruth Whitehorn

Petitioners

vs.

Margaret H. Murphy,
Law Firm: Smith, Gambrell & Russell and
Robert M. Garstin

Respondents

—o—

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

—o—

REPLY BRIEF

—o—

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Case No. 90-820

In The

Supreme Court of the United States

October Term 1990

Jack R. Whitehorn and
Mary Ruth Whitehorn

Petitioners

vs.

Margaret H. Murphy,
Law Firm: Smith, Gambrell & Russell and
Robert M. Garstin

Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF TO RESPONDENTS' BRIEF IN OPPOSITION

COME NOW Jack R. Whitehorn and Mary Ruth Whitehorn, petitioners herein, and respectfully file this their reply brief to respondents Margaret H. Murphy and Law Firm; Smith, Gambrell & Russell's Brief in Opposition to Petition for Writ of Certiorari.

First, petitioners emphasize to the Court that respondents Margaret H. Murphy and Smith, Gambrell & Russell's lower court case No. 89-15630 and respondent Robert M. Garstin's lower court case No. 89-15767 were appealed by separate notice. Separate docket fees were paid by petitioners.

Respondents Murphy and Law Firm: Smith, Gambrell & Russell case No. 89-15630 was filed and docketed by the lower court March 17, 1989. Respondent Robert M. Garstin's lower court case No. 89-15767 was filed and docketed on June 13, 1989.

The significance of this crucial fact is respondents' case No. 89-15630 contested process of service, while respondent case No. 89-15767 was hand served and has not contested the process of service.

The lower court intermixed the said cases and set out (Petition for Writ of Certiorari, Appendix 1): "We also agree with the district court that the Whitehorns improperly served the appellees." Thus the lower court ran afoul of the district court order since respondent Garstin did not contest the process of service and the district court made no such finding.

The time for filing a "brief in opposition" has expired pursuant to Court rules and respondent Garstin has forfeited any opposition to the "Petition for Writ of Certiorari" now before the court.

The respondents Murphy and Law Firm: Smith, Gambrell & Russell's "Brief in Opposition" served on petitioners herein was not signed by any party on behalf of said respondents. However, petitioners will reply in case the Court has accepted and considers the said "Brief in Opposition."

The Court's Rule 15 sets out the "Brief in Opposition should address any preconceived misstatements of fact or law set forth in the petition which have a bearing on the question of what issues would properly be before the court if certiorari were granted."

Petitioners' analysis of the said "Brief in Opposition' reflects respondents have acquiesced to the "Petition for Writ of Certiorari" as they fail to address or refute the specific legal rationale underlying the said petition.

It appears the thread respondents continue to grasp is the erroneous contention of the doctrine of *res judicata*. The said doctrine applied to the complaint at bar through confirmation of a plan of reorganization of WFDR, Inc. (bankruptcy case of a different entity).

Further, more predominant than prior pleadings respondents advance improper service of the instant complaint.

The respondents misinterpret the instant complaint and the significance that the "Federal Communication Commission (FCC) broadcast licenses" were not, are not, and never can be a part of the WFDR, Inc. estate. This fact is well grounded by United States Statute, precedent case law and the United States Constitution. Said authorities are well maintained in the "Petition for Writ of Certiorari" and will not be repeated here.

Respondents' illusions that 11 U.S.C. § 1141, the "effect of confirmation," is involved is not supportable as a matter of law. The court must have jurisdiction to implement said statute, as fully discussed in the petition. The corporate court, on its own, denied jurisdiction over

FCC law. The said statute cannot possibly be involved. The inappropriateness and futility of said statute as proclaimed is contrary to the instant complaint as a matter of law. Title 11 U.S.C. § 541(a)(1) provides that regardless of location, property of the estate is comprised of "all legal and equitable interests of the debtor as of the commencement of the case." The "FCC' broadcast licenses" are not property of the corporate estate as positive law sets out in the petition, but to the contrary, by "settlement" the "FCC broadcast licenses" became the property of petitioner Jack Whitehorn in bankruptcy case No. BK-S-80-00936-RCJ, United States Bankruptcy Court for the District of Nevada as fully set out in the petition and is indisputable.

Moreover, the following settled law will further invalidate 11 U.S.C. § 1141 being applied to the instant complaint. A second action was barred by claim preclusion except as to matters that occurred after the filing of the first action; *Spiegel v. Continental Ill. Nat. Bank*, C.A. 7th 1986, 790 F.2d 638, 644-646 certiorari denied 107 S. Ct. 579, 479 U.S. 987, 93 L.Ed 2d 582.

The amended plan of WFDR was filed on May 27, 1981. Said plan confirmed by the bankruptcy court June 29, 1981. (Record below) The "Fraud" complained of was perpetrated by respondents filing fraudulent written document before the "FCC" on or about July 14, 1981.

The purposes of issue preclusion do not support preclusion as to a matter that was simply assumed, but neither decided in a prior proceeding. *See Washington Water Power Co. v. FERC*, C.A.D.C. 1985, 775 F.2d 305, 341.

Right off the bat the Atlanta Houdini's are at it again, with yet another false and misleading maneuver. In "Brief in Opposition," Statement of the Case,

respondents state the complaint at bar has been litigated by other tribunals and are trying to equate said proceedings with the instant complaint -- an incorrect determination, *animo* by respondents.

Respondents' portrayal of petitioners' "neglect or ignorance of legal rights and responsibilities" is not as represented. Petitioners set out in the petition the reasons we must proceed pro se and we are not as articulate as learned counsel for respondents. However, stupidity allows comprehension that the first lesson one must learn on the subject of *res judicata* is that judicial findings must not be confused with absolute truth. For purposes of *res judicata* a cause of action is comprised of the facts which establish the right * * * . * * * [O]ne has to determine whether a wrong for which redress is sought is the same for both actions; *See Midcontinent Broadcasting Co. v. Dresser Indus.*, C.A. 8th, 1982, 669 F.2d 564.

Respondents set out *animo* by "phrase" or "words" throughout their "Brief in Opposition" statements designed to achieve the appearance of a fact or change the legal context of a judicial proceeding or judgment, *i.e.*:

Page 4, ¶ 2: "Complaint seeks damages . . . arising out of the handling of the bankruptcy of WFDR, Inc."

The respondents, not by any jurisdictional court order through the WFDR, Inc. bankruptcy case but by greed, the motivation behind the legal action, committed "Fraud." (See Complaint/Petition Appendix 4.)

Page 5, ¶ 4: "After unsuccessfully challenging various aspects of the WFDR chapter 11 proceedings, petitioners filed a voluntary individual petition under Chapter 11 in Nevada on October 6, 1980."

The petitioners herein filed their personal chapter 11 case in good faith, pursuant to a legitimate and genuine desire to obtain the judicial relief available through chapter 11 of the United States Bankruptcy Code.

Page 6, ¶ 1:

Respondents did not mention, while setting forth the WFDR order entered March 16, 1981, Petitioners' raising the "FCC Law" matter and the bankruptcy court's unconditional and absolute renouncing of jurisdiction over "FCC Law." It is "clear that the parties need only have had the opportunity to raise the question of jurisdiction; *see Republic Supply Co. v. Shoaf*, C.A. 5th, 1987, 815 F.2d 1046, 1051-1053. **The petitioners did in fact comply.**

Page 7, ¶ 2: "Ownership interest in WFDR, evidenced by the newly issued certificates of interest tendered in exchange for the cancelled shares, was to be redeemed by the payment of $35,000 from the proceeds generated subsequent to the sale to Provident." (Emphasis added.)

The word redeem or redeemed does not appear, said word changes the legal context of the document and *animo* is a false declaration to this Court.

Page 7, ¶ 3: "On January 26, 1984, the bankruptcy court approved the settlement in recognition and satisfaction of petitioners' interest in WFDR." (Emphasis added.)

The word **satisfaction** does not appear in the said bankruptcy order, a patent change of legal context of said order and a false declaration to this Court.

Page 7, ¶ 4: "Petitioners essentially asked the court to avoid the earlier transfer of the WFDR stock to Provident. (Emphasis added.)

Petitioners herein were under the impression that the stock was cancelled, **not transferred**. Petitioners were not privy to be involved in the stock transaction even though the original certificates were issued and titled to petitioner Jack Whitehorn. (See Murphy Deposition below.) If said stock was actually transferred, there is certainly no question as to the automatic stay; 11 § 362 being violated in petitioners' personal bankruptcy case. "The Complaint to Compel Turnover of Property" is not as characterized by respondents.

Page 8, ¶ 3: "Specifically, petitioners alleged that they were damaged as a result of the deprivation of stock and assets, including FCC licenses sold as a result of the WFDR bankruptcy." (Emphasis added.)

The instant complaint does not bare any nexus to the false and misleading statement by respondents. As set out *supra*, the instant complaint is absolutely silent as to any claim arising out of the handling of the WFDR bankruptcy case. There is absolutely no claim of deprivation of the WFDR stock, and certainly no claim for any WFDR assets. The respondents characterize the "FCC Licenses" as an asset sold as a result of the WFDR bankruptcy. Petitioners do not believe respondents are this misinformed nor are they so blind as not to comprehend the instant complaint, The respondents are *animo* trying to deceive this Court by their sophisticated schemes and abuses.

To apply the amended plan of WFDR, Inc, *i.e.*, Statute 11 U.S.C. § 1141, to the complaint at bar, the court must have jurisdiction to make orders or judgments. Every court has jurisdiction to determine its own

jurisdiction. When a bankruptcy court has ruled on its jurisdiction, it can then be taken to the District Court on appeal. *See Ravin v. New Jersey Bank, N.A.*, 32 B.R. 716 (D.N.J. 1983). Here there was no appeal to the Georgia Bankruptcy Court rejecting jurisdiction to FCC law. "The determination by a court of general jurisdiction of its own jurisdiction is conclusive as to the parties and their privies"; *In re Constructors of Florida, Inc.*, C.A.. 5th, 1965, 349 F.2d 595, 600, certiorari denied 86 S. Ct. 886, 383 U.S. 912, 15 L.Ed. 2d 667.

FCC law, nor the complaint at bar, was never before the Georgia Bankruptcy Court after said court's rejection of jurisdiction. Order Filed March 16, 1981. (Petition Appendix 6)

The *Southmark Properties v. Charles House Corporation*, 742 F.2d 862 (5th Cir. 1984) case, cited by respondents, is not by any means apposite to the instant complaint. The said case may be distinguished as follows: Respondent Garstin was acting president, not petitioner. The majority shareholder was not "settled" until January 26, 1984, not as said case reports. Petitioner herein filed pleadings with the corporate bankruptcy court. These pleadings set out that the proposed sale violated the rules and regulations of the Federal Communications Commission. The court denied jurisdiction and did not address the issue. The instant complaint is absolutely not *res judicata*.

Page 14, ¶ 2: "The only argument petitioners make with regard to res judicata **is that the Georgia courts did not** re-try **the issue of whether the FCC properly approved the sale of the licenses owned by WFDR."** (Emphasis added.)

This barbaric statement goes directly to why the writ of certiorari should issue. First, the said bankruptcy

has never ruled on the FCC action. An FCC license is not a saleable commodity. The right to use air for radio which is dependent on government permit, limited both as to extent and time is permissive not vested. *See American Bond and Mortgage Co. v. U.S.*, C.C.A. Ill. 1931, 52 F.2d 318. Certiorari denied 52 S. Ct. 311, 285 U.S. 538, 76 L.Ed. 931.

Page 14, ¶ 2: "In its letter refusing to deny or defer transfer of control of the licenses from WFDR to Provident, the FCC specifically stated that the issue of ownership of the licenses and stock had already been determined by the bankruptcy court and that any remaining issues were legal issues rather than administrative issues. Therefore the issues of whether the FCC properly allowed the transfer of the licenses and other assets of WFDR was resolved in the bankruptcy court and in the Georgia related proceedings."

Respondents' characterization of the FCC letter to petitioners (Petition Appendix 9) is repulsive. In judicial review of a Commission decision, the court may consider only what the agency did, not counsel's post hoc rationalization. *See Sudbrink Broadcasting, Inc. of Florida v. Federal Communications Commission*, 1974, 509 F.2d 419, 166 U.S. App. D.C. 85.

An attorney is not to make a false statement of fact. A court troubled by attorney quoting a statute but leaving out a key word cited authority to the effect that the duty of an attorney to deal honestly and candidly with the court even to the extent of disclosing adverse authority is greater than the duty to the client; *United States v. Ott*, 489 F.2d 872 (7th Cir. 1973).

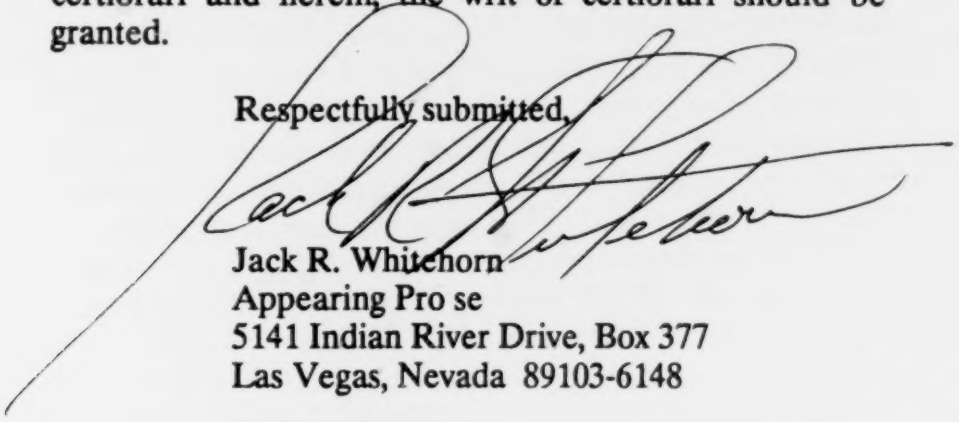
With reference to improper service, the Third Circuit has said: "An action is related to bankruptcy if the outcome could alter the debtor's rights either positively or

negatively and which in any way impacts upon the handling and administration of the bankruptcy estate; *Pacor, Inc. v. Haggins*, 743 F.2d 984, 994 (3 Cir. 1984); *In re Bobroff*, 766 F. 2d 797 (3 Cir. 1985).

CONCLUSION

For reasons as set out in the petition for writ of certiorari and herein, the writ of certiorari should be granted.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certified that I have served the requisite number of copies of the foregoing Reply Brief on:

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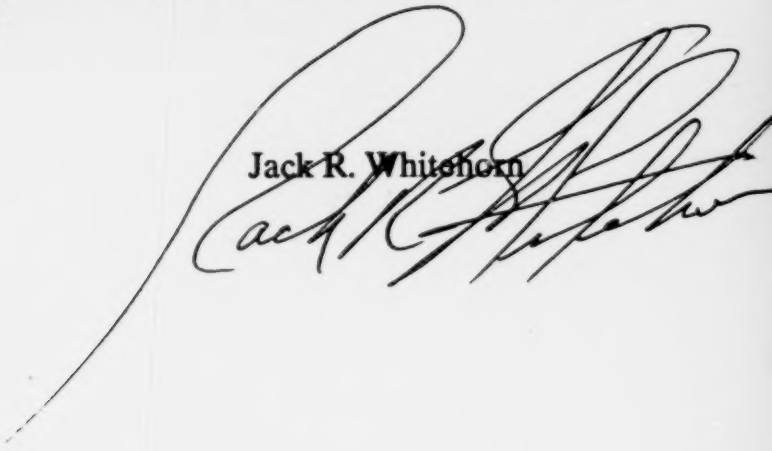
by placing same in the United States mail, first class postage prepaid, this 22nd day of December 1990. I further certify that all parties required to be served have been served.



Jack R. Whitehorn